United Nations

A/HRC/33/42/Add.1

General Assembly

Distr.: General
8 August 2016

Original: English

**Human Rights Council**
**Thirty-third session**
Agenda item 3
**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, on her mission to Brazil from 7 to 17 March 2016. The main objective of the visit was to identify and assess the main issues currently facing indigenous peoples in the country and to follow up on key recommendations made in 2009 by the previous mandate holder.

Brazil has a number of exemplary constitutional provisions pertaining to the rights of indigenous peoples and was, in the past, a leader in the area of demarcation of indigenous peoples' territories. However, in the eight years since the visit of the previous mandate holder, there has been a disturbing absence of progress in the implementation of his recommendations and the resolution of long-standing issues of key concern to indigenous peoples. The Special Rapporteur noted a worrying regression in the protection of indigenous peoples' rights. In the current political context, the threats facing indigenous peoples may be exacerbated and the long-standing protections of their human rights may be at risk.

GE.16-13695(E)

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# Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil*

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* Circulated in the language of submission only.

# I. Introduction

1. The Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, visited Brazil from 7 to 17 March 2016, at the invitation of the Government. The purpose of the visit was to identify and assess the main issues currently facing indigenous peoples in the country and to follow up on key recommendations made in 2009 by the previous mandate holder, following his visit to Brazil.

2. The Special Rapporteur's visit was prompted by requests on the part of indigenous peoples in Brazil and communications sent by the Special Rapporteur to the Government between 2010 and 2015 regarding the indigenous communities in Mato Grosso do Sul and Raposa-Serra do Sol, the Belo Monte and the São Luiz do Tapajós hydroelectric projects, the demarcation of indigenous peoples' lands and attacks against and killings of indigenous persons defending their human rights.

3. The visit coincided with the heightening of the political crisis in Brazil that led to considerable political upheaval, including the ongoing process to impeach the President and the formation of an interim Government. The Special Rapporteur is closely monitoring the situation and is in communication with the Government of Brazil about her concerns regarding the implications of these political developments and associated institutional, legislative or policy changes for the well-being and survival of indigenous peoples and their enjoyment of land and cultural rights.

4. In the light of the evolving political situation, the report also includes observations on information received by the Special Rapporteur following her visit, which has direct bearing on the issues examined during the visit. The objective of the report is to encourage an open and constructive dialogue with the Government in relation to the realization of the rights of indigenous peoples.

# II. Overview of the mission

5. During her visit to Brazil, the Special Rapporteur travelled to Brasilia and to the states of Mato Grosso do Sul, Bahia and Para. She met with representatives of the three branches of Government in Brasilia, including the National Indian Foundation (FUNAI), the Prosecutor General, offices of the Public Prosecutor at the federal and state levels, the Presidents of the Federal Supreme Court and the Superior Court of Justice. She also met with the Minister of Culture; the Secretary of Government; officials from the Ministry of External Relations; the Department of Continuing Education, Literacy, Diversity and Inclusion (SECADI) of the Ministry of Education; the Special Department on Indigenous Health (SESAI) of the Ministry of Health; the Ministry of the Environment; the former Ministry of Social Development and the Fight against Hunger; the Secretary of State for Human Rights under the former Ministry of Women, Racial Equality, Youth and Human Rights; the Executive Secretary and President of FUNAI under the Ministry of Justice; and the Attorney General. The Special Rapporteur also met the Vice-Governor of Mato Grosso do Sul, members of Congress, representatives of the Agriculture and Livestock Federation of Mato Grosso do Sul (FAMASUL); representatives of the European Union delegation and the Embassy of Norway; the United Nations country team; Amazon Cooperation Treaty Organization; members of the National Council on Human Rights; and the Brazilian Development Bank (BNDES).

6. She was invited by members of the Commission on Human Rights and Minorities of the Chamber of Deputies to address the Chamber, along with representatives of the Association of Indigenous Peoples of Brazil (APIB), the Missionary Council for Indigenous Peoples (CIMI) and the Brazilian Anthropological Association (ABA).

7. The Specil Rapporteur visited the Guarani-Kaiowá people in Kurussu Ambá, Guayviry and Taquara indigenous lands as well as the Dourados reserve. She met with the Terena Council in Mato Grosso do Sul; the Tupinambá in Serra do Padeiro and Atikum villages in Tupinambá de Olivença indigenous land. She also spoke to representatives of the Pataxó in Comexatiba indigenous land in Bahia. In Pará, she visited Juruna indigenous land, a Muratu village, Volta Grande and met with representatives of the Parakanã in Apyterewa indigenous land and the recently contacted Arara people in Cachoeira Seca indigenous land. She also met with representatives of the Curuaia and Xipaya in Altamira. The situation of the indigenous peoples in the Tapajós River basin was explained to her by members of the Munduruku, Arara Vermelha, Apiaká, Arapiun, Borari and Tapuia of Pará. She met representatives of more than 50 indigenous peoples from at least 13 states, including the Yanomami, Maxakali, Manoki, Kaingang and Ka'apor and the Amazon Cooperation Network. She also met indigenous students at the University of Brasilia and a wide range of civil society and human rights organizations working in the area of indigenous peoples' rights.

8. The Special Rapporteur expresses her gratitude to the Federal Government of Brazil for its full cooperation, which enabled her to carry out her visit freely and independently. She also expresses her deep gratitude to the indigenous peoples representatives who invited her to visit their communities, indigenous organizations and individuals who assisted in organizing parts of her agenda, as well as indigenous persons who travelled from their communities to meet with her. She thanks the United Nations country team and the Office of the United Nations High Commissioner for Human Rights for their support in ensuring the success of her visit.

## III. Demographic, legal and policy context

9. There are approximately 305 groups in Brazil who self-identify as indigenous peoples, speaking over 274 different languages. Despite the fact that they represent only 0.43 per cent of the population, indigenous peoples are present in 80 per cent of Brazilian municipalities. Genocidal colonial processes resulted in the decline of the native population from an estimated five million people, prior to European arrival, to less than one million, today. However, according to the 2010 national census by the Brazilian Institute of Geography and Statistics, the indigenous population is growing.

10. The nine states comprising the Amazon region have the highest concentration of indigenous peoples in terms of diversity and population. The states of Amazonas and Mato Grosso do Sul are home to 20 per cent and 9 per cent of the country's indigenous population, respectively, with the Guarani-Kaiowá comprising 3 percent of the population in Mato Grosso do Sul. By 2015, the presence of 26 isolated indigenous peoples was confirmed through surveys and field activities conducted by FUNAI. Surveys are either in process or pending in relation to over 50 other isolated groups.

11. The progressive 1988 Constitution contains some exemplary provisions for the protection and promotion of indigenous peoples' rights. Recognition is afforded to the country's cultural diversity and two articles in the Constitution address indigenous peoples' rights. Article 231 provides that Indians shall have "their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy". It provides protection for these rights, especially in relation to the

exploitation of natural resources on indigenous lands; protects indigenous peoples against dispossession of or forced removal from their lands; and places a duty upon the Union to demarcate the lands traditionally occupied by indigenous peoples and "to protect and ensure respect for all their property". Article 232 provides indigenous peoples and their organizations with standing to sue to defend their rights and authorizes the Public Prosecutor to intervene on behalf of indigenous peoples in all pertinent cases.[1] In 2002, Brazil ratified International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which is considered to be ranked above domestic laws.[2]

12. Following consultations with indigenous peoples, the Ministry of Justice and the Ministry of the Environment established the National Policy on Land and Environment Management in 2012 to address the realization of indigenous peoples' rights following land demarcation. The policy aims to ensure practical steps to guarantee indigenous peoples full possession of their lands and recognition of their traditional knowledge and governing capacity over their territories and natural resources.

## IV. Information presented to the Special Rapporteur

13. During her visit, the Special Rapporteur received extensive information from indigenous peoples, civil society and representatives of the Government. The present report contains a brief overview of the main themes that were brought to her attention. These include the positive measures and initiatives taken by the Government to implement indigenous peoples' rights and measures taken by indigenous peoples themselves to this end; issues pertaining to reprisals, threats and killings of indigenous peoples; the impact of large-scale development projects in or near indigenous peoples' lands and associated consultation processes; concerns raised in relation to land demarcation processes; the role of FUNAI; and issues pertaining to access to justice.

### A. Positive measures and initiatives

14. The Special Rapporteur commends the Government for the measures and initiatives taken to realize indigenous peoples' rights. During her visit, she was informed of the following:

(a) The constructive and proactive role of specialized agencies, such as FUNAI and the Public Prosecutor's Office, aimed at protecting indigenous peoples' rights, despite the difficult circumstances in which they operate, in particular staff working in local FUNAI offices or in remote areas;

(b) The establishment of an internationally recognized legal and administrative framework for the demarcation of indigenous lands and the protection of land rights, including in cases involving isolated indigenous peoples;

(c) The Government's opposition to the proposed constitutional amendment, PEC 215, which would undermine the land demarcation and rights protection framework;

(d) Decisions by the Federal Supreme Court to prevent evictions of indigenous peoples, in particular in Mato Grosso do Sul, São Paulo, Bahia, Rio Grande do Sul and Parana;

[1] See A/HRC/12/34/Add.2, para. 13.

[2] See ILO, "Application of Convention 169 by domestic and international courts in Latin America" (Geneva, 2009), p. 12.

(e) The organization of the first national conference on indigenous policies, aimed at encouraging the State to review and revise colonial-based attitudes and policies towards indigenous peoples, and the establishment of the National Commission on Indigenous Policies;

(f) The engagement on the part of the Minister of Culture with indigenous peoples, based on the recognition of the symbiotic relationship between their cultures and their territorial rights, and the need for policies based on an understanding of their distinct ways of life and protection of their languages;

(g) The establishment of a working group within the National Council on Human Rights to gather and disseminate information on the situation of indigenous peoples' rights in the southern states of Parana, Santa Catarina and Rio Grande do Sul;

(h) Efforts to implement differentiated services for indigenous peoples in the areas of health and education, as recommended by the previous mandate holder in 2009,[3] including acknowledgment of the need to improve the family allowance and other social programmes to avoid negative impacts on indigenous peoples' ways of life and autonomy and to make such services more sensitive and responsive to the specific situations of indigenous peoples.

15. The Special Rapporteur also noted the good practices and proactive approaches on the part of indigenous peoples to pursue the realization of their rights. These include the development of consultation protocols incorporating the consultation and free, prior and informed consent procedures developed by the Wajãpi in Amapá and the Munduruku in Pará; self-demarcation of lands;[4] the formation of alliances with the Quilombola and Ribeirinho communities to strengthen land and self-governance rights such as in Oriximiná in Pará; self-protection of territories, for example, through the use of indigenous forest guards set up by the Ka'apor in Maranhão; and partnerships with judicial bodies to strengthen indigenous conflict-resolution systems, such as that between the indigenous peoples of Roraima and the Federal Supreme Court, and to defend their rights, such as that between the Yanomami and the Public Prosecutor's Office for their right to health.

16. These constitute steps by indigenous peoples towards self-management and self-regulation of their territories and self-determination and autonomy, as envisaged in ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples and the Organization of American States draft American Declaration on the Rights of Indigenous Peoples. They should be fully supported by the Government. The Special Rapporteur also commends the active network of civil society organizations assisting indigenous peoples in the assertion of their rights and the establishment of the National Rapporteur on Human Rights and Indigenous Peoples.

## B. Violence, threats and killings

17. A matter of pressing concern is the number of documented and reported attacks on indigenous peoples. According to the Missionary Council for Indigenous Peoples, 92 indigenous persons were murdered in 2007; by 2014, that number had increased to 138, with Mato Grosso do Sul having the highest number of deaths.[5] Attacks and killings are

[3] See A/HRC/12/34/Add.2.

[4] In October 2014, the Munduruku opted for self-demarcation of their land.

[5] See Conselho Indigenista Missionário, *Report: Violence against Indigenous Peoples in Brazil: 2014 data* (Brasilia, 2015), p. 74.

frequently reprisals after indigenous peoples reoccupy ancestral lands following long delays in demarcation processes.

18. Community members in Mato Grosso do Sul showed the Special Rapporteur bullet wounds on their bodies and took her to places where family members had been killed. They also recounted incidents of arbitrary arrests and criminalization of their leaders. Fears were expressed that the anti-terrorism law, which has been criticized by a number of United Nations Special Rapporteurs, could be inappropriately applied to indigenous peoples and increase the risk of such criminalization. Likewise in Bahia, the Special Rapporteur received detailed accounts of torture and arbitrary arrests. Staff and members of the Government and civil society organizations working with indigenous peoples also provided her with disturbing accounts of a regular pattern of threats and intimidation by State and private actors.

19. Numerous cases of violence against indigenous peoples in urban settings were reported, with an emblematic and particularly disturbing case being the beheading of a Kaingang baby in Santa Catarina on 31 December 2015. The failure of the mainstream media to report this case was regarded by many people as symptomatic of the general public's growing prejudice against, and hatred towards, indigenous peoples.

20. The recognition by the Government of the need to protect human rights defenders, including indigenous leaders, and the important role that the former Ministry of Women, Racial Equality, Youth and Human Rights played in this regard is noteworthy. However, information provided by communities throughout the country indicates that the programmes remain inadequate for indigenous peoples, partially due to lack of engagement on the part of state governments. There is also a lack of trust in state and border police and, in some cases, even in the federal police, arising from the involvement of officers in incidents of violence against indigenous peoples. In most cases, impunity allows violent practices by private security forces, armed mercenaries and State forces to continue unabated.

## C. Land demarcation

21. A constant refrain from indigenous peoples throughout the country was the urgent need to complete the land demarcation processes, as this is fundamental to all their rights. They repeatedly stressed that the State's prolonged lack of effective action and protection is forcing them to reclaim their lands in order to guarantee their survival. Many even stated that if faced with evictions they would not leave their lands and would be prepared to die on them, if necessary.

22. The Special Rapporteur heard that efforts of indigenous peoples to reclaim their lands, resist evictions and protect their territories from illegal activities frequently placed them in conflict situations, as was the case of the Guarani-Kaiowá and Terena in Mato Grosso do Sul, the Pataxó and Tupinambá in Bahia, the Arara and Parakanã in Pará, the Ka'apor in Maranhão and the Guarani Mbya and Kaingang in the southern states of Brazil.

23. The current stagnation of land demarcation processes was attributed to a combination of factors, including:

(a) The debilitation and understaffing of FUNAI;

(b) The lack of political will to conclude demarcation procedures at the ministerial and Presidential level;

(c) A poor understanding of and appreciation for indigenous peoples' distinct ways of life and the absence of human rights training for senior members of the executive;

(d) A constant cycle of administrative delays and the judicialization of almost all demarcation processes by vested interests, coupled with Supreme Court delays in granting final decisions on the cases;

(e) The possibility of political gain by certain actors through misrepresentation of the implications of indigenous land demarcation for small farmers and municipalities, leading to discrimination against and conflict with indigenous peoples;

(f) Long-standing efforts by the legislature to reform demarcation processes and modify environmental legislation so as to facilitate resource exploitation in indigenous lands;

(g) Failure to recognize the compatibility of indigenous lands and conservation units and the role that respect for indigenous peoples' land rights can play in environmental conservation and sustainable development.

24. The urgency for land demarcation is exacerbated by deforestation, destruction of rivers and depletion of soil quality due to intensive monocropping and mining activities, all of which render land and water inadequate for sustaining indigenous peoples' lives. The inadequacy of the State's response to these threats has prompted indigenous peoples to protect their territories and natural resources themselves. At times, this puts their lives at risk, as in the case of the Ka'apor indigenous land in Maranhão and the Manoki indigenous land in Mato Grosso do Sul.

25. Many indigenous peoples and civil society organizations expressed concern about the situation of isolated indigenous peoples in the states of Pará, Mato Grosso, Maranhão, Rondonia and Amazonas. They highlighted the need to strengthen and enhance the efforts of FUNAI to ensure respect for their rights and protect their territories, including through dialogue and cooperation with bordering countries.

## D. Role of the National Indian Foundation

26. The Special Rapporteur received information from indigenous peoples throughout Brazil in relation to the important role that FUNAI and the Public Prosecutor's Office play in the protection of their rights. Governmental agencies and ministries also referred to their reliance on FUNAI to realize their own actions and programmes for indigenous peoples. However, it was also stressed that the capacity and local presence of FUNAI were being debilitated to the point where the Foundation may soon no longer be able to fulfil its mandate. Concerns were raised regarding the political, rather than technical basis of the nomination of the President of FUNAI and the implications for the autonomy and ability of the Foundation to fulfil its mandate.

27. Indigenous peoples, civil society and independent experts also expressed fear for the survival of many indigenous peoples in isolation and initial contact, in the light of new and complex threats, including cross-border threats, infrastructure development, agribusiness expansion, Christian missionaries and reduced State protection.

## E. Access to justice

28. The growing use by the judiciary of the "security suspension" (*suspensão de segurança*) mechanism — which allows for certain rights to be suspended in favour of other interests — was raised by indigenous peoples as a major concern in the context of development projects. This mechanism allows projects to proceed even if they may result in serious violations of indigenous peoples' rights and the State has not complied with the duty to consult in order to obtain the free, prior and informed consent of stakeholders.

29. The Special Rapporteur was informed that some judicial decisions continue to refer to indigenous peoples in a pejorative and discriminatory manner. She was also told that some judges and public defenders seem unable to relate to the reality of indigenous peoples, which places an extra burden on indigenous peoples when they attempt to assert their rights.

30. Indigenous leaders also expressed fear that justice would be denied if their rights to their lands that have not yet been demarcated were to be extinguished without their consent in negotiations between the Government and third parties.

31. Information received by the Special Rapporteur indicate that impunity is pervasive in relation to serious violations of indigenous peoples' rights, including killings of their leaders. Such intimidation, attacks and killings frequently arise in contexts where indigenous peoples attempt to assert their rights over their lands and go hand in hand with the criminalization of indigenous leaders.

32. The Special Rapporteur was seriously concerned about reports of adoptions of indigenous children authorized by judges without due respect for the rights of the children as set out in the Convention on the Rights of the Child, the rights of their extended families, who, in indigenous cultures, traditionally play an important role in such contexts, and the rights of their communities.

## F. Development projects and the duty to consult

33. Indigenous peoples reported dire threats to their rights and existence in the context of large-scale or high-impact development projects, including megaprojects such as the construction of hydroelectric dams and infrastructure, mining and the laying of transmission lines, that are launched without meaningful consultation to seek their free, prior and informed consent in accordance with ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.[8] Concerns were also raised in relation to attempts to change or enact national legislation that directly impact their rights, such as the Mining Code, without meaningful prior consultation with concerned indigenous peoples.

34. A number of megaprojects that have serious implications for indigenous peoples' rights were brought to the attention of the Special Rapporteur. These include projects for which no prior consultation took place with indigenous peoples or other minority groups, such as the Quilombola in Oriximina in Para, including bauxite mining and associated hydroelectric power plants, which together constitute a major industrial complex; the pollution of the Rio Doce by the collapse of the Minas Gerais dam and its impact on indigenous peoples, such as the Krenak, who are dependent on the river for their livelihoods and subsistence; and the major transmission line projects inside constitutionally protected and demarcated lands, such as the indigenous lands of the Waimiri-Atroari in Roraima.

35. The Special Rapporteur received extensive information about the construction and operation of the Belo Monte and the Tapajós River basin dams, which raised issues common to many megaprojects in Brazil.

[8] For a discussion of the impact of large-scale development projects on indigenous peoples, see E/CN.4/2003/90.

# V. Emblematic cases

## A. Belo Monte

36. The Special Rapporteur visited the Juruna people on the Xingu River who are affected by the Belo Monte dam. Since its outset almost 30 years ago, the project has been shrouded in controversy and resisted by the indigenous peoples whose lives it impacts. In 2009, the previous mandate holder noted that indigenous groups and non-governmental organizations had complained that the Belo Monte project was being carried out without adequate mitigation measures and consultations with the affected indigenous communities.[7] In his observations on this case, he highlighted the need for concerted efforts to carry out adequate consultations with indigenous peoples and to endeavour to reach consensus with them on all aspects of projects affecting them. He also stressed that the minimum steps to be taken should include the mitigation and land demarcation measures proposed by FUNAI.[8]

37. A series of prominent national court cases were filed by the Public Prosecutor's Office. However, the judiciary's invocation of the security suspension mechanism prevented legal challenges by indigenous peoples and allowed the projects to proceed without compliance with the State duty to consult to seek the free, prior and informed consent of the affected peoples. The Inter-American Commission on Human Rights issued precautionary measures in 2011,[9] in which it addressed the lack of adequate prior consultation, the inaccessibility of impact assessments and the urgent need to protect indigenous peoples' life and physical integrity. Despite this, governmental authorizations were issued for the project to proceed.

38. Notably, in November 2015, the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) granted Norte Energia S.A. an operating licence, notwithstanding documented reports by FUNAI of non-compliance with the conditions stipulated in the 2010 request.[10] Similar advice from the Public Prosecutor's Office not to approve the project until the necessary mitigation measures were in place was ignored.

39. At the time of the Special Rapporteur's visit in March 2016, construction of the dam had been completed and the reservoirs were being filled. As foreseen by the affected indigenous peoples, the dam has resulted in their loss of control over their lands, rivers and resources. Although the dam itself is not located within demarcated indigenous lands, it directly affects the indigenous peoples in the surrounding 11 indigenous lands.

40. During her visit to the area, the Special Rapporteur was informed of the lack of meaningful and culturally appropriate information and consultations and the successful attempts to divide the communities. Community members and their representatives rejected the notion that the Government or Norte Energia had adequately consulted them or informed them of the potential impacts during any of the phases of the project. They said that public hearings on the project were grossly inadequate compared with the standard of consultation provided for in ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples and explained that no efforts had been made to obtain

[7] See A/HRC/12/34/Add.2, para. 57.

[8] See A/HRC/15/37/Add.1, para. 53.

[9] See Inter-American Commission on Human Rights, PM 382/10 (2011).

[10] See FUNAI, Report No. 233/2015/CGLIC/FUNAI-MJ (Brasília, 23 September 2015), attachment to official letter 410 of 24 September 2015, and IBAMA, Technical report No. 02001.003622/2015-08 (23 September 2015).

their free, prior and informed consent and no opportunities had been provided for their participation in decision-making. The Special Rapporteur was also informed that adequate impact assessments had not been conducted or shared.

41. The communities described how their traditional livelihoods based on fishing and hunting were no longer possible as river currents had been radically changed, the water had turned turbid and fish stocks had decreased. They explained that mosquito-transmitted illnesses had increased, extensive areas had been deforested, islands had been submerged and peoples had been displaced. Inadequate and inappropriate housing has been provided for those displaced by the dam, sometimes to places which lacked access to the Xingu River.

42. The Special Rapporteur was particularly alarmed to learn that mitigation measures and enabling conditions identified as necessary for the project to proceed had not been implemented, which compounded the serious impacts on indigenous peoples' lives and rights. The demarcation of Cachoeira Seca indigenous lands[11] as well as regularization and full protection of Apyterewa and Paquiçamba indigenous lands had not proceeded in accordance with the agreed time frames. Adequate compensation had not been provided for loss of livelihoods, nor had participatory monitoring units to protect indigenous lands been established and the local FUNAI has been weakened rather than strengthened.

43. Meanwhile, the measures taken had compounded the harm — including the distribution of processed foods to the communities, allegedly to quell opposition to the project —, with the effect of accelerating the loss of traditional livelihoods. Communities complained that they lacked drinking water and health services and had become dependent on markets in faraway Altamira to sell what produce they can to purchase food.

44. Communities residing along the river face unannounced release of water or declines in water levels, resulting in stagnant pools of water near their homes which attract hordes of disease-bearing mosquitos. These pools were visible in the community that the Special Rapporteur visited. Members of that same community explained that, in January 2016, Norte Energia had opened the floodgates with no advance warning, causing the river level to rise by seven metres in one hour and washing away their boats, which had yet to be replaced at the time of the Special Rapporteur's visit.

45. On 7 December 2015, a case was filed by the Public Prosecutor's office in Altamira against the Government and Norte Energia, alleging ethnocide as a result of the impacts of the project — a reflection of the gravity of the impacts of such megaprojects and the inadequacy of the associated mitigating measures. Another case was opened by the Inter-American Commission on Human Rights against Brazil on 21 December 2015, illustrating the serious ongoing concern about the well-being of the affected indigenous peoples at the national, regional and international levels.

46. A licence was issued by the government of Para for the Belo Sun gold mining project, which is in close proximity to the Belo Monte dam and which directly affects the Juruna community. This proceeded in the absence of consultations to obtain the free, prior and informed consent of the indigenous peoples concerned and without the conduct of an urgently needed cumulative assessment of the environmental, social and human rights impacts. The potential impacts are therefore a matter of very serious concern.

[11] The demarcation of Cachoeira Seca lands, a precondition for the construction of the dam, was done following the Special Rapporteur's visit.

## B. Tapajós dam complex and São Luiz do Tapajos dam

47. According to information provided to the Special Rapporteur, there are 10 indigenous peoples in 118 villages in the Tapajós River basin, an area extraordinarily rich in animal and plant biodiversity. The Munduruku, who number around 13,000 people, is the largest group, and the presence of isolated peoples has also been documented in the Tapajós region.

48. Munduruku representatives with whom the Special Rapporteur met described the sacredness of the river, forests and resources. They explained that they were now living under a constant threat as a result of the Tapajós project, but emphasized their unity in their struggle to protect their territory and prevent its destruction. In order to facilitate meaningful consultations, they developed a consultation protocol which they presented to the Government in January 2015; they have not yet received any response. Instead of culturally appropriate prior consultations, individual households had allegedly been approached by a consulting firm employed by Grupo de Estudo Tapajos and offered compensation to abandon their opposition and debilitate indigenous collective decision-making in relation to the project. As in other projects, so-called public hearings were being conflated with the State duty to consult indigenous peoples. In addition, concerns had been expressed on the use of security forces to intimidate the Munduruku and other indigenous peoples opposed to the project.

49. Extensive documentation was provided to the Special Rapporteur alleging violations of indigenous peoples' rights in the context of the Tapajós dam complex. In addition to the absence of good faith consultations to obtain the free, prior and informed consent of the affected peoples were the failure to demarcate indigenous lands affected by the project and the conduct of inadequate environmental and social impact assessments after political decisions regarding the dams had been taken. These assessments are reported to have grossly underestimated the impacts on indigenous peoples' rights and the risks associated with the dams and ignored the unique relationship that indigenous peoples have with their territories, upon which their cultural and physical survival depends.

50. There also appears to be a lack of a cumulative impact analysis of dam cascades at the river basin level and the associated impacts on indigenous peoples' livelihoods. The necessary mitigation and compensation measures have reportedly not been adequately costed, rendering the economic viability studies unreliable and posing further threats to the well-being of the indigenous peoples.

51. The Tapajós complex facilitates a number of other activities that impact directly on indigenous peoples' rights, including illegal mining (*garimpo*) and logging activities and the construction of roads and ports. Logging concessions in the Itaituba II national forest, which overlaps the Sawré Muybu indigenous land, and the Crepori national forest, which impacts Munduruku lands, were issued by the Ministry of the Environment without prior consultation. The Public Prosecutor has opened legal cases regarding these concessions and obtained favourable preliminary decisions, but a significant risk of further logging remains.

52. As was the case in the Belo Monte project, cases filed by the Public Prosecutor addressing human right violations of the Tapajós complex have been subject to the security suspension mechanism, thus rendering ineffective another judicial decision affirming that consultation with indigenous peoples had to take place prior to granting an operating licence for the dam.

53. Following the visit by the Special Rapporteur, in April 2016, the then Government took a number of steps to protect the rights of the Munduruku. This included initiating the demarcation of Sawré Muybu territory and suspending the licensing procedure of the

Ministry of the Environment for the São Luiz do Tapajos dam, based on the position taken by FUNAI that the project was incompatible with indigenous peoples' constitutional rights.

## VI. General observations

54. The challenges facing many of Brazil's indigenous peoples are enormous. The origins of these challenges range from historically based and deeply entrenched discrimination of a structural nature, manifested in the contemporary neglect and denial of indigenous peoples' rights, to more recent developments associated with changes in the political landscape.

55. Serious challenges to indigenous peoples' rights arise in the context of increasing discrimination, as manifested in demonstrations against indigenous peoples, stalled demarcation processes, including approximately 20 land demarcations pending Presidential ratification and ministerial declaration, ongoing evictions and constant threats of further evictions, profound and ever-increasing impacts of megaprojects located in or near indigenous peoples' territories and implemented without meaningful prior consultations to obtain the free, prior and informed consent of the affected peoples, violence, racism, killings, threats and intimidation perpetrated with impunity against indigenous peoples and those who work with them, inadequate protection for indigenous communities and their leaders and increasingly frequent criminal allegations against them.

56. As a result of these challenges, the Special Rapporteur believes that, today, indigenous peoples face more profound risks than at any time since the adoption of the Constitution in 1988. Some of her concerns and observations are highlighted below.

### A. Structural issues

57. The concentration of economic and political power in the hands of a small segment of Brazilian society has historically contributed to the exploitation of the lands and resource of indigenous peoples, without consideration for their rights or well-being.

58. During her visit, the Special Rapporteur repeatedly heard reports that individual, political and economic gain has contributed to institutional racism, violations of indigenous peoples' rights and conflicts, including in the context of decisions pertaining to megaprojects and exploitation of natural resources in indigenous lands.

59. The observation of the previous mandate holder that "indigenous peoples as a whole are disadvantaged economically and in terms of access to political power in relation to most of the rest of Brazilian society"[1] would, unfortunately, appear to be even more pertinent today, with indications of deep-seated structural discrimination towards indigenous peoples being on the increase and institutional changes serving to further disempower them.

### B. Violence and discrimination against indigenous peoples

60. The Special Rapporteur is particularly concerned at the level of racially based violence against indigenous peoples in the states of Mato Grosso do Sul, Pará, Bahia, Maranhão, Rio Grande do Sul, Santa Catarina and Paraná. Tackling and eliminating racism, discrimination and violence against indigenous peoples and ensuring protection of the lives of indigenous leaders and community members is an issue that requires immediate and

[1] See A/HRC/12/34/Add.2, para. 9.

concerted action. She is extremely concerned that states, such as Pará, with an alarmingly high rate of murders of human rights and environmental defenders, including indigenous peoples, have no policy for the protection of human rights defenders and no functioning partnership with the federal programme.

61. The Special Raporteur was extremely alarmed that a series of armed attacks, leading to the injury of indigenous peoples in the communities of Kurussu Amba, Dourados and Taquara in Mato Grosso do Sul, were carried out immediately followed her visit to these areas. Equally alarming is the fact that, some days after these incidents took place, indigenous peoples reported that no State authority had visited the areas.

62. The Special Rapporteur decries these attacks and calls on the Government to put an end to such human rights violations, to investigate them and to bring their intellectual authors and perpetrators to justice. She commends the Prosecutor General and the Public Prosecutor for carrying out the investigation into the violent attacks of 14 June 2016 in Mato Grosso do Sul and for denouncing 12 people involved in using militias against indigenous peoples. She urges the judiciary to promptly conclude the process and hold those responsible to account.

## C. Megaprojects, legislative and administrative measures and the duty to consult

63. The Special Rapporteur is concerned that prior consultations were not carried out with affected indigenous peoples in relation to megaprojects such as the Belo Sun gold mine in Pará and the Manaus-Boa Vista transmission line in Roraima. She is also concerned that, in relation to the Belo Monte and São Luiz do Tapajós dams, mere public hearings were deemed to fulfil the obligation to consult. In general, there is no adequate mechanism for consultation with indigenous peoples in relation to major development projects.

64. In addition, no consultation procedure has been established in relation to policies or legislative and administrative measures that directly impact indigenous peoples. This lack of consultation is highly problematic, given the continued attempts in the National Congress, where indigenous peoples have little to no representation, to weaken the constitutional and legislative protections of their rights. These include proposals for constitutional amendment PEC 215, which would transform land rights recognition from a technical to a political process and legislation, such as the new Mining Code, and changes to licensing procedures for megaprojects, which undermine indigenous peoples' rights to lands, territories and resources and do not include adequate safeguards.

65. These actions constitute a failure on the part of the Government to implement good faith consultations with indigenous peoples in order to obtain their free, prior and informed consent. Such consultations are necessary to protect indigenous peoples' rights in accordance with the State duty set out in the domestic legal framework, ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples and international and regional human rights treaties and jurisprudence.

66. The Special Rapporteur is concerned that the State's interpretation of when its duty to consult corresponds to the requirement to obtain the free, prior and informed consent of indigenous peoples is not consistent with the provisions and purpose of the legal instruments that protect indigenous peoples' rights, including their right to self-determination by which they determine their own social, cultural and economic

development and maintain and develop their autonomous ways of life, and their right to cultural and physical survival as peoples.[11]

67. The Special Rapporteur is particularly concerned about the potential impact on indigenous peoples of the Tapajós dam complex. Impacts similar to those in the Belo Monte project appear inevitable unless there is full compliance with human rights standards from the planning stages through to project design and operation.

68. The Special Rapporteur welcomes the Government's recognition of the impacts on Sawré Muybu indigenous lands caused by the São Luiz do Tapajós dam and the suspension of the licensing process by the Brazilian Institute of Environment and Renewable Natural Resources in the light of the project's incompatibility with indigenous peoples' constitutionally recognized rights. She is, however, concerned by reports that the land demarcation process may face political obstacles owing to its implications for the licensing processes. Completion of the land demarcation process is essential for the Munduruku and would serve as a first significant step to guaranteeing their human rights and those of other affected peoples.

## D. Land demarcation

69. A common theme in discussions with members of the executive was the perception of being hamstrung by the judiciary and the legislature when attempting to protect indigenous peoples' rights and demarcate indigenous lands. Although impediments undoubtedly exist, the Special Rapporteur does not believes that they constitute an acceptable excuse for such lengthy delays in the land demarcation processes and the associated violations of rights leading to violence against indigenous communities. A serious concern is the frequent issuance of eviction orders when indigenous peoples reclaim and occupy lands that they are entitled to under the 1988 Constitution, but which the State has failed to demarcate in the last 28 years. While not necessarily binding in other cases,[12] the highly controversial and strongly contested Supreme Court interpretation of the 1988 Constitution in the Raposa-Serra do Sol ruling — which introduced the temporal framework requiring indigenous peoples to have been in possession of their lands or to have had claims in process when the Constitution was enacted, with no consideration given to how or why they were removed from their lands — imposes constraints on indigenous peoples' rights to possess and control their lands and natural resources and hinders land demarcation. Lower courts as well as the Superior and Supreme Courts[13] are applying the decision in ways that are completely at odds with the indigenous land rights provisions of the Constitution. In so doing, the State is forcing indigenous peoples off their own lands and depriving them of the enjoyment of their basic rights as well as fueling violence against them.

70. The failure of the State to protect indigenous peoples' lands from illegal activities, in particular mining and logging, is a matter of grave concern. Even where indigenous peoples have demarcated territories, such as in the Amazon region, they lack effective control over their resources owing to increasing invasions associated with illegal activities, as in Cachoeira Seca, Apyterewa, Manoki, Yanomami and Ka'apor indigenous lands.

[11] See *Saramaka People v. Suriname*, Judgment of 28 November 2007, Inter-American Court of Human Rights; and A/HRC/24/41, paras. 26-30.

[12] As affirmed by the Supreme Court ruling of May 2016 concerning Yvy Katu in Mato Grosso do Sul.

[13] See the rulings concerning Guyraroka and Limão Verde in Mato Grosso do Sul, and Porquinhos in Maranhão.

## E. Health, education and social services

71. Brazil has made efforts to improve and adapt its service provision in relation to indigenous health care, education and social services. However, indicators of indigenous youth suicide, cases of illegal adoption of indigenous children, infant mortality and alcoholism, violence against indigenous women and the accelerated loss of indigenous languages reflect the ongoing lack of culturally appropriate services.

72. The Special Rapporteur is particularly concerned about the health impacts of illegal mining and the use of mercury in Yanomami lands. Their experience and the challenges they face are illustrative of the integral relationship between indigenous peoples' health, education and cultural rights and the realization of their territorial and self-governance rights.

## F. Capacity of the National Indian Foundation, paternalism and indigenous peoples in voluntary isolation and initial contact

73. Recently proposed measures to reduce FUNAI budget and staff run completely counter to the demands of indigenous peoples in Brazil. They are also at odds with the recommendations of the previous mandate holder, who had stressed the need to strengthen FUNAI to enable the State to fulfil its legal obligations concerning the protection of indigenous peoples' rights.

74. Despite its challenges, FUNAI appears to have made progress in its efforts to overcome paternalistic postures towards indigenous peoples. However, unless FUNAI is properly supported, this progress is vulnerable to setbacks. Entrenched discrimination and paternalistic views appear to continue to inform law-making, policymaking and judicial decisions by many administrative bodies and authorities. Many regard the current political and institutional weakening of FUNAI as symptomatic of the State's resistance to fully transition to new relationships with indigenous peoples, based on self-determination.

75. The work of FUNAI in relation to indigenous peoples in voluntary isolation is premised on respect for the principle of non-contact, which is understood as a core element of the right of peoples in isolation to self-determination, and has served to inform the guidelines of the Office of the United Nations High Commissioner for Human Rights and the Inter-American Commission on Human Rights and to influence the policies developed by neighbouring countries. In this regard, FUNAI has an important role to play as a contributor to the work of the Amazon Cooperation Treaty Organization, an intergovernmental body established to address the situation of cross-border indigenous peoples in voluntary isolation or initial contact and to promote high-level regional dialogue on the treaty. The Special Rapporteur is, however, concerned that missionary activity is posing a threat to indigenous peoples in initial contact as well as to the traditional forms or organization and autonomy of other remote indigenous groups.

## G. Safeguards of the Brazilian Development Bank

76. Despite reassurances from the Brazilian Development Bank (BNDES) that impacts on indigenous peoples are adequately considered in the projects it funds, the Special Rapporteur is concerned that its safeguards and practices are inadequate to ensure protection of indigenous peoples' rights, in particular in the light of the Belo Monte experience and the massive loans provided to agribusiness corporations allegedly involved in evictions and violence against indigenous peoples.

## H. Corporate responsibility to respect indigenous peoples' rights

77. The Special Rapporteur highlights the responsibility of businesses sourcing goods or materials, such as sugar, soy or animal produce, from Mato Grosso do Sul, or timber, palm oil or minerals from elsewhere in Brazil, to conduct adequate human rights due diligence to ensure respect for indigenous peoples' rights in their supply chains. Similarly, companies involved in mining, hydroelectric dams, transmission lines or infrastructure projects have a responsibility to conduct due diligence with regard to indigenous rights and assess whether the State has complied with its duty to consult to seek the free, prior and informed consent of indigenous peoples and has guaranteed that the projects will not impact on indigenous peoples' rights.

78. Given the serious nature of violations of indigenous peoples' rights — including allegations of ethnocide — and the failure of the Brazilian authorities to adequately address them or provide effective remedies, particular caution is necessary on the part of corporate actors, including banks, in order to live up to their responsibility under the Guiding Principles on Business and Human Rights,[10] to "know and show" that they are not complicit in or contributing to such rights violations.

## I. Access to justice

79. The lack of access to justice for indigenous peoples is a major issue. In Brazil, indigenous peoples face significant barriers in accessing justice owing to a lack of resources, cultural and linguistic barriers, institutional racism and ignorance of their cultures and rights on the part of the judiciary and the law enforcement forces. These barriers are compounded by actions and omissions of the State in relation to consultation and participation rights, the use of mechanisms that deny rights, such as the security suspension by the judiciary, and its failure to give adequate consideration to indigenous peoples' land rights, for example, through the inappropriate application of the Constitution in the Raposa-Serra do Sol ruling. The presumption that land demarcation processes will be brought under the remit of the law is then used as justification to delay demarcation, so that the law is transformed into an obstacle to, rather than an enabler for, the realization of indigenous peoples' rights.

80. The failure to ensure access to justice for indigenous peoples in a context where historical violence against them has gone unaddressed, alongside the increasing criminalization of indigenous peoples and violent attacks and killings with impunity, sends a message to those responsible that there will be no repercussion for their actions. For indigenous peoples, it signals that the State institutions, including the law enforcement and justice systems, lack both the will to ensure that their rights are protected and any genuine concern about their plight.

## J. Recent developments

81. The political situation in Brazil changed significantly following the Special Rapporteur's visit, with the appointment of an interim Government and the implementation of a number of institutional changes. The Special Rapporteur is concerned that the political and economic crisis is serving to render indigenous peoples' rights and issues invisible and less significant in the eyes of politicians and the public, to the detriment of addressing structural discrimination and imbalances in power in a manner beneficial to them.

[10] See A/HRC/17/31, annex.

82. The Special Rapporteur also received information regarding an escalation in violence against indigenous peoples and their leaders following her visit. This included reports of increasing violence and discrimination in the states of Santa Catarina and Rio Grande do Sul against the Kaingang, Guaranis and Xokleng peoples.

83. In an alarming incident on 14 June 2016, violent attacks by a group of armed men, reportedly organized by *fazendeiros* (farm or plantation owners), resulted in the death of one Guarani Kaiowa and the injury of several others in Caarapo city, Mato Grosso do Sul. According to information received, the attack occurred in the context of the demarcation of Dourados-Amambaipegua indigenous lands. This land demarcation had been recently initiated following studies by FUNAI, and the community had occupied a parcel of the land.

84. The Special Rapporteur received information on arrests of indigenous leaders in the state of Bahia and has communicated with the Government expressing her concerns. Fears have been expressed that the April 2016 provisional decision of the President of the Supreme Court to suspend the demarcation of the Tupinamba de Olivença indigenous land in Bahia may result in further violence against indigenous peoples. She continues to monitor the situation in both Mato Grosso do Sul and Bahia.

85. Indigenous peoples' representatives provided information on the elimination by the interim Government of the Ministry of Women, Racial Equality, Youth and Human Rights and the establishment of the human rights secretariat under the Ministry of Justice. They expressed concern about the potential indigenous rights implications of this action and other retrogressive measures purportedly being considered in relation to recent demarcation processes of indigenous lands.

86. The Special Rapporteur shares the concerns and fears of indigenous peoples about regression in legal and institutional protections. In this regard, she stresses the fundamental importance of ensuring that changes to government structures resulting from the current political context must not result in setbacks in the protection and promotion of human rights.

87. The Special Rapporteur considers the disbandment of the Ministry of Women, Racial Equality, Youth and Human Rights as a significant regression in Brazil's commitment to protect human rights. She is concerned that this could have a particularly profound impact on indigenous peoples, who are amongst the most in need of protection. In this regard, she is also concerned about the status, functioning and future of the National Council on Human Rights and the recently established National Council on Indigenous Policies.

88. The Special Rapporteur is particularly concerned about reports that the interim Government is considering reversing the ratifications and declarations of indigenous lands implemented by the previous Government, following her visit, including measures to expropriate Condá indigenous land in Santa Catarina. The National Council on Human Rights committed to provide her with additional information on visits to southern Brazil immediately following her visit.

89. Prior to this, the previous Government had taken a number of measures that were in accordance with the Special Rapporteur's preliminary recommendations.[17] These included the presidential ratification of the Cachoeira Seca indigenous land in the state of Pará, the Piaçaguera indigenous land in São Paulo and the Pequizal do Naruvotu indigenous land in Mato Grosso, declarations by the Ministry of Justice of indigenous lands in Mato Grosso

[17] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18498&LangID=E.

and Mato Grosso do Sul and proactive measures to recognize the rights of indigenous peoples in the Tapajós region and to suspend the dam licensing process.

90. While welcoming the interim Government's reaffirmation of Brazil's open invitation to all special procedure mandate holders, the Special Rapporteur was dismayed to learn that, as part of a congressional investigation on FUNAI and the National Institute for Colonization and Agrarian Reform (INCRA), certain members of Congress raised questions regarding her official visit to Brazil and requested information about the individuals who were involved in it.

91. The Special Rapporteur is concerned that the convergence of these and other worrying developments will have a negative impact on indigenous peoples' rights. She therefore calls upon the Government to implement the recommendations outlined below and to continue to engage in dialogue with her mandate on the increasingly urgent situation of indigenous peoples in Brazil.

# VII. Conclusion and recommendations

## A. Conclusion

92. **The Special Rapporteur's overall impression, following her visit, is that Brazil has a number of exemplary constitutional provisions pertaining to indigenous peoples' rights and was, in the past, a leader in the area of demarcation of indigenous peoples' territories. However, in the eight years since the visit of the previous mandate holder, there has been a disturbing absence of progress in the implementation of his recommendations and the resolution of long-standing issues of key concern to indigenous peoples. Instead, information received points to an extremely worrying regression in the protection of indigenous peoples' rights. In the current political context, the threats facing indigenous peoples may be exacerbated and the long-standing protections of their human rights may be at risk.**

93. **The Special Rapporteur makes some recommendations to address the most pressing issues she observed during her mission. They relate to the need for urgent measures to address violence and discrimination against indigenous peoples; strengthen State institutions such as FUNAI; build the capacity of State officials, including senior members of the executive and lower court judges, in the light of their inappropriate application of doctrines that deny rights; redouble efforts in land demarcation and protection; allocate resources to improve access to justice; guarantee meaningful good-faith prior consultation and participation of indigenous peoples in relation to large-scale or high-impact development projects and respect for indigenous peoples' own consultation and consent protocols and proposals for addressing development issues; and ensure participatory impact assessments and redress for harm caused.**

94. **Given the marginalized status of indigenous peoples, the fact that serious violations of their rights, over recent decades, have not been adequately investigated or remedied and the urgent need to address ongoing structural discrimination, the Special Rapporteur places particular emphasis on the importance of initiating an independent and transparent national inquiry into violations of their rights. This should be implemented in cooperation with indigenous peoples, with the aim of transforming the State's relationship with them into one that is based on respect, justice and self-determination.**

95. Brazil owes a historical debt to its indigenous peoples who have suffered marginalization and discrimination since the formation of the State. Despite the hardships they have endured, they remain unwavering in their resolution to preserve their lands, to maintain and develop their cultures, customs and languages and to determine their own futures. Rather than being seen as a burden on the State or an obstacle to national development, their contributions to Brazilian society should be widely recognized and fully appreciated and celebrated. With this in mind, Brazil should embark on an inclusive process of belated State-building with its indigenous peoples premised on respectful and just relationships between self-determining peoples.

## B. Recommendations

### Right to life, violence and racial discrimination

96. The Special Rapporteur respectfully urges the Government of Brazil to:

(a) Take immediate measures to protect the safety of indigenous leaders, including through strengthened and culturally appropriate protection programmes, and to conduct investigations into all attacks and killings of indigenous peoples and bring perpetrators to justice;

(b) Conduct a public campaign aimed at eliminating racism, discrimination, hate speech and violence towards indigenous peoples;

(c) Accord particular and urgent attention to the situation of indigenous children, youth and women, especially in relation to the alarming rates of suicides in indigenous communities, the increasing violence against indigenous women and the illegal adoption of indigenous children.

### Land rights

97. The Special Rapporteur recommends that the Government:

(a) Redouble efforts to move beyond the current impasse in relation to land demarcation. This is particularly urgent in the states of Mato Grosso do Sul, Bahia, Santa Catarina and Rio Grande do Sul.[18] The executive should develop, in collaboration with indigenous peoples, proactive proposals to respect and fulfil indigenous rights to land, through a thorough examination of all avenues available. This should include approaches to address the judicialization of demarcation processes and give consideration to appropriate compensation in relation to their repossession of lands, recognized in the 1988 Constitution as indigenous lands, and for which the Federal or state governments granted titles to private individuals;

(b) Complete all demarcation processes pending at FUNAI, the Ministry of Justice and the Presidency, in particular those threatened by development projects, agribusiness expansion and natural resource extraction activities;

(c) Develop concrete and prioritized actions to guarantee environmental protection of indigenous lands and their natural resources and to prevent illegal activities, with due consideration to and respect for indigenous peoples' forms of organization and their special relationship with their lands;

[18] Demarcation processes to be finalized include indigenous lands in Morro dos Cavalos (Santa Catarina), Toldo Imbu (Santa Catarina) and Rio dos Índios (Rio Grande do Sul).

(d) **Ensure that all courts have a clear and uniform interpretation of the limitations of the Raposa-Serra do Sol ruling and its inapplicability to the issuance of eviction orders for indigenous peoples or the halting of demarcation procedures. The Federal Supreme Court should continue to accept requests for the suspension of eviction orders and ensure that future rulings concerning indigenous peoples' rights are fully consistent with national and international human rights standards.**

**Self-determination, the duty to consult and free, prior and informed consent**

98. **The Special Rapporteur recommends that the Government:**

(a) **In collaboration with representatives of indigenous peoples and in accordance with their right to self-determination, develop a national action plan for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in keeping with Brazil's commitment at the World Conference on Indigenous Peoples;**[19]

(b) **Implement the State duty to consult indigenous peoples in relation to projects, policies and legislative and administrative measures that have an impact on their rights. Such consultations should be conducted to see their free, prior and informed consent in a manner that takes into account the specificities of each indigenous people, as affirmed in ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples and the Organization of American States draft American Declaration on the Rights of Indigenous Peoples. In the case of development projects, consultations should be informed by independent and participatory environmental, social and human rights impact assessments;**

(c) **Acknowledge and support the proactive measures taken by indigenous peoples to realize their rights, including their right to self-determination. This includes observing and responding to consultation and consent protocols developed by indigenous peoples in the context of the State duty to consult;**[20]

(d) **Ensure full respect for the rights of indigenous peoples in voluntary isolation in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and the draft guidelines on their protection.**[21]

**Impacts of development projects**

99. **The Special rapporteur recommends that the Government:**

(a) **Adopt measures to redress the impacts and consequences of mining activities, agribusiness expansion and other large-scale development projects on indigenous peoples' health, lands, cultures and way of life, including their social and economic forms of organization. These measures should also address the secondary impacts of such projects, which are often associated with speculation and the entry of third parties as a result of increased ease of access to indigenous lands;**

(b) **In the light of the allegations of ethnocide in the Belo Monte case brought by the Public Prosecutor, extreme caution should be exercised in relation to the Belo Sun mining and the Tapajós dam projects. These projects should not be considered if the potential for similar impacts exists or if the indigenous peoples concerned withhold their free, prior and informed consent following the conduct of**

[19] See General Assembly resolution 69/2, para. 8.
[20] See the protocols developed by the Wajãpi in Amapá and the Munduruku in Pará.
[21] See A/HRC/EMRIP/2009/6.

participatory social, environmental and human rights impact assessments and good faith consultations.

Access to justice

100. The Special Rapporteur recommends that:

(a) The judiciary, the legislature and the executive give urgent consideration, in collaboration with representatives of indigenous peoples, to the elimination of barriers that prevent indigenous peoples from realizing their right to justice and guarantee that adequate resources be available to this end;

(b) The Government initiate dialogue with indigenous peoples in relation to the possible conduct of a national inquiry into the allegations of violations of their rights, as well as raise awareness, recognize State wrongdoings and provide redress for human rights violations.

Capacity of government agencies

101. The Special Rapporteur recommends that the Government:

(a) Provide adequate funding to FUNAI, strengthening its capacity to deliver services and its role in protecting indigenous peoples' land and self-determination rights. This necessitates revisiting cuts to its budget and ensuring that local FUNAI offices are not the target of such measures. Local offices should have adequate resources to be able to provide core services that are relied upon by other organs of the State and by indigenous peoples, including those in voluntary isolation. The National Council on Indigenous Policies should participate in the appointment of the President of FUNAI, who should have the necessary technical competence and political independence to fulfil the Foundation's mandate;

(b) Continue to support and strengthen the Special Department on Indigenous Health of the Ministry of Health and the Department of Continuing Education, Literacy, Diversity and Inclusion of the Ministry of Education;

(c) Guarantee conditions for the independent and participative functioning of the National Council on Indigenous Policies;

(d) Develop a more responsive and targeted family allowance programme for indigenous peoples, taking into account their specific situations;

(e) Draw on lessons learned and the experience of FUNAI and the Public Prosecutor's Office in support of the implementation of indigenous peoples' rights and disseminate them among other government agencies, including higher level government officials;

(f) Ensure the provision of specific training and guidance on indigenous peoples' rights to members of the judiciary who address issues such as land rights, prior consultation and adoption of indigenous children. This could include, for example, collegial dialogues with members of the judiciary in countries with an extensive body of jurisprudence on indigenous peoples' rights, such as Colombia.

Recommendations to other actors

102. The United Nations country team should assume a proactive role in promoting awareness of and respect for indigenous peoples' rights in Brazil and assist the Government in the realization of its duty to respect, protect and fulfil those rights. In cooperation with and guided by indigenous peoples, the country team should support indigenous peoples in their efforts to assert and realize their constitutionally and

internationally recognized human rights and to participate in relevant processes of the Human Rights Council, such as the universal periodic review.

103. The Special Rapporteur encourages the Brazilian Development Bank (BNDES) to align its policies with those of other international financial institutions, such as the International Financial Corporation, and to develop specific safeguards aimed at ensuring that it does not fund projects that pose a risk to indigenous peoples' rights. These policies should guarantee that indigenous peoples are consulted, their free, prior and informed consent is obtained and transparent and participatory environmental, social and human rights impact assessments are conducted whenever their rights are potentially impacted by a project funded by the Bank.

104. In keeping with their independent obligations to respect indigenous peoples' rights, corporations, including banks and other investment facilities, should conduct due diligence in relation to indigenous peoples' rights, including their land and consultation and consent rights, both for their own operations and for those in their supply chains. In all cases where human rights have been violated, companies should participate in meaningful remediation processes in consultation with the concerned indigenous peoples, use their leverage to prevent further rights violations and ensure appropriate remediation.

105. The Special Rapporteur reiterates the recommendations of the Working Group on Business and Human Rights on its mission to Brazil in 2016 regarding the need to (a) review the use of the security suspension mechanism in the context of vulnerable communities affected by development projects; (b) promptly carry out indigenous land demarcation and ensure that it remains the responsibility of the executive, contrary to the proposal contained in PEC 215 to place it under the responsibility of the legislature; (c) improve the capacity of and the resources allocated to the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) and improve coordination between the Institute and FUNAI in order to strengthen the regulation of large development projects and deliver sustained protection for affected communities and enable them to monitor the social and environmental impacts of such projects and the fulfilment of any conditions imposed in mitigation plans.[22]

106. The Special Rapporteur also urges the Government to implement the recommendations from the 2012 universal periodic review that it had accepted, with regard to the need to ensure protection of leaders of indigenous peoples and human rights defenders fighting for their rights; awareness campaigns on the rights of indigenous peoples and the implementation of laws related to them; implementation of consultation and consent rights in accordance with ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples in relation to projects and legislative and administrative measures impacting them; greater protection of their rights to land, territories and resource, as recognized in the Constitution and ILO Convention No. 169; and poverty reduction and social services that directly target indigenous peoples in a culturally appropriate manner.[23]

107. Implementation of the recommendations in the present report as well as the recommendations of the previous mandate holder on his visit to Brazil in 2009, of the Working Group on Business and Human Rights and of the universal periodic review process should proceed with the full and effective participation of indigenous peoples.

[22] See A/HRC/32/45/Add.1, para.70 (k), (l), (q) and (s).
[23] See A/HRC/21/11.

108. **The Government of Brazil should make every effort to address the concerns raised by the Special Rapporteur in the present report and live up to the emblematic global benchmark that Brazil had set for the protection of indigenous peoples in its 1988 Constitution and through its ratification and adoption of international human rights instruments. To realize this, the measures outlined in these recommendations are urgently required.**

United Nations

A/HRC/33/42/Add.2

General Assembly

Distr.: General
21 July 2016
English
Original: Spanish

**Human Rights Council**
**Thirty-third session**
Agenda item 3
**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras. The report is based on information received by the Special Rapporteur during her visit to the country from 2 to 10 November 2015 and on independent research.

The situation of the indigenous peoples of Honduras is critical, since their rights over their lands, territories and natural resources are not protected, they face acts of violence when claiming their rights, in a general context of violence and impunity, and they lack access to justice. In addition, they suffer from inequality, poverty and a lack of basic social services, such as education and health.

They call for immediate and decisive protection measures, including the prevention, investigation and punishment of persons responsible for murdering, threatening and harassing members of indigenous peoples and also of those responsible for actions that infringe their rights over their lands, natural resources and other human rights. The legal, political and institutional framework must be overhauled and strengthened in order to deal with the situation properly and effectively, with reforms including coordination between government agencies to ensure the cross-cutting implementation of the Government's international commitments on the rights of indigenous peoples. All this requires more public resources and greater political will. Serious and committed participation by the international community and the international human rights bodies is essential in order to ensure international oversight of such efforts and to provide the necessary technical and financial assistance.

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# Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras*

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* The report is circulated in the language of submission and English only.

** Circulated as received, in the language of submission only.



GE.16-12632

# I. Introduction

1. This report examines the situation of indigenous peoples in Honduras and makes recommendations in that regard. It is based on information received by the Special Rapporteur on the rights of indigenous peoples during her visit to the country from 2 to 10 November 2015 and on independent research.

2. During her visit, the Special Rapporteur held meetings in Tegucigalpa with representatives of the Government of Honduras, including the Ministry of Foreign Affairs, the Directorate of Indigenous and Afro-Honduran Peoples, the Ministry of Human Rights, Justice, the Interior and Decentralization, the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage, the National Agrarian Institute, the Property Institute, the National Institute for Conservation and Forestry Development, Protected Areas and Wildlife, the Ministry of Energy, Natural Resources, the Environment and Mining, the Honduran Institute of Geology and Mines, the Office of the National Commissioner for Human Rights, the Honduran Social Investment Fund, the General Subdirectorate of Education for Indigenous and Afro-Honduran Peoples, the Ministry of Labour and Social Security, the Committee on Indigenous Peoples of the National Congress and representatives of civil society organizations and the private sector. In Puerto Lempira, she held meetings with municipal and departmental authorities and representatives of the Attorney General's Office and the Office of the National Commissioner for Human Rights. She also met representatives of the Lenca, Maya Chorti, Nahua, Tolupan, Garifuna, Pech, Tawahka and Miskito indigenous peoples in Tegucigalpa, Puerto Lempira, Auka, Rio Blanco, La Esperanza and La Ceiba.

3. The Special Rapporteur wishes to thank the Government of Honduras for its cooperation and for permitting her to conduct her visit freely and independently. She would also like to express her deepest gratitude to the indigenous peoples for the invitation to visit their territories, for the hospitality that they showed her and for the information that they provided. She also thanks the indigenous persons and organizations that helped arrange her programme and also those persons who travelled long distances from their communities of origin to attend meetings. Lastly, she wishes to thank the United Nations Country Team in Honduras and the Office of the United Nations High Commissioner for Human Rights (OHCHR) for their assistance in ensuring the success of her visit.

# II. Indigenous peoples in Honduras

4. There is no precise or up-to-date information on the indigenous population of Honduras. According to the 2001 national census, 7 per cent out of the total population of about 6 million were indigenous or of African descent. According to a census conducted by indigenous organizations in 2007, the indigenous population or people of African descent amounted to 20 per cent, or some 1.5 million out of a total population of 7.6 million. Of the indigenous population, 80 per cent live on their traditional lands and 20 per cent in urban areas.

5. The extent to which the indigenous peoples of Honduras have preserved their languages and their social and cultural structures varies according to their specific experience and levels of contact with European colonization and subsequent non-indigenous governments and societies. During her visit, the Special Rapporteur noted the strong attachment that members of indigenous peoples had to their identity as distinct peoples and their desire to maintain and strengthen their culture, language, lore, territories and forms of governance.

6. The indigenous peoples of Honduras represent a rich cultural diversity throughout the country. These peoples — and their locations and numbers — are, according to the 2001 census:

- Lenca (279,507), who live mainly in the Intibucá, La Paz, Lempira and Santa Bárbara Departments in the west of the country
- Maya Chortí (34,463), in the western Copán and Ocotopeque Departments
- Tolupan (9,617), in the central Yoro and Francisco Morazán Departments
- Garífuna (46,448), on the Atlantic seaboard stretching from Cortés Department to Gracias a Dios Department
- Nahua (20,000, according to unofficial data), in the eastern Olancho Department
- Pech (3,848), in Colón, Olancho and Gracias a Dios Departments
- Tawahka (2,463), in the eastern Olancho, Colón and Gracias a Dios Departments
- Miskito (51,607) in Gracias a Dios Department

7. All the indigenous peoples have one or more organizations or federations that represent the interests of their members or specific sectors of their population. During the 1990s, the indigenous peoples and organizations went on political demonstrations or "pilgrimages" in Tegucigalpa to draw the attention of the Government and the general public to their claims for their territories, culture, languages and access to health, education and other social services. As a result of these demonstrations, some progress was made in recognizing their title to their indigenous lands and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) was ratified. The provision of education and health services for indigenous communities improved.

## III. Legal, political and institutional framework

8. Honduran domestic legislation contains hardly any recognition of or protection for the rights of indigenous peoples. The country's constitutional recognition of indigenous peoples has lagged behind that of other Latin American countries over the past decades. The only reference to indigenous peoples' rights in the Constitution comes in article 346, which provides for the duty of the State to "adopt measures to protect the rights and interests of indigenous communities in the country, especially the lands and forests where they have settled". Other constitutional provisions refer to the obligation of the State to foster the country's anthropological richness, native cultures and folklore (arts. 172 and 173).

9. The Constitution provides that international treaties form part of domestic law (art. 15) and that "in the event of a conflict between the treaty or convention and the law, the former shall prevail" (art. 18). Honduras has ratified the main international and regional human rights treaties, in addition to ILO Convention No. 169 (in 1995), and voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. However, there is no secondary legislation to ensure that the rights enshrined in these international instruments are actually implemented.

10. Under agrarian law, indigenous communities that can prove that they occupy their lands can obtain title in fee simple from the National Agrarian Institute.[1] Forestry law "recognizes the right of indigenous and Afro-Honduran peoples over forest areas in lands

[1] Agricultural Sector Modernization and Development Act, Decree No. 31-92, art. 65.

that they traditionally possess, in accordance with national legislation and International Labour Organization Convention No. 169".[2]

11. One cause for concern is the Property Act (2004), which provides for the registration of indigenous lands by the Property Institute. The Act recognizes the traditional forms of tenure of indigenous lands, their inalienability and immunity from seizure and the non-applicability of statutory limitations.[3] However, it permits communities to "terminate a communal regime, to authorize leases to third parties" or to authorize contracts for investment in development.[4] The Act grants ownership rights to a third party that has obtained title within communal lands and taken possession of such lands, and also the right to compensation for any improvements made, if the title in question was voidable. If the third party had no title, "it could reach agreement on obtaining tenure, with the community paying the appropriate ground rent".[5] Representatives of the indigenous peoples say that these provisions infringe the guarantees of the inalienability of indigenous lands, according to international standards, and legitimize the presence of outsiders without the consent of the indigenous peoples.

12. The Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage was established in 1994 as a specialized department of the Public Prosecution Service to adjudicate on complaints of violations of indigenous peoples' rights, to oversee the implementation of international standards and to ensure the observance of due process for indigenous persons involved in criminal trials. The Office has handled numerous complaints relating to the murder of indigenous leaders, the appropriation of lands and the approval of development projects without prior consultation.

13. The Directorate of Indigenous and Afro-Honduran Peoples attached to the Ministry of Development and Social Inclusion has the task of formulating, coordinating and implementing programmes and policies relating to indigenous peoples in the area of social and economic development. Before 2014, it was a ministry. Its change of status in 2014 was seen by representatives of the indigenous peoples as indicating a reduction in resources and political support for indigenous affairs. The Directorate informed the Special Rapporteur that its budget has not been reduced and, indeed, has increased.

14. According to the Directorate, it has promoted the following legislative and public policy initiatives, which have been agreed with representatives of the indigenous peoples and will be submitted to the executive or the legislature for approval: the Public Policy against Racism and Racial Discrimination for the Comprehensive Development of Indigenous and Afro-Honduran Peoples, which addresses social and political participation, intercultural education and health, lands and natural resources and access to justice; the draft special law on the rights of indigenous peoples and people of African descent, which includes provisions on the registration, expansion, upgrading and delimitation of indigenous lands, education, natural resources, cultural heritage, justice and a new institutional structure for indigenous affairs; and a draft framework law on engaging in consultations with indigenous and Afro-Honduran peoples and obtaining their free, prior and informed consent. The Special Rapporteur found that the representatives of indigenous peoples or the State officials whom she met had little or no knowledge of these initiatives. Moreover, it is a matter of concern that indigenous organizations have publicly rejected the draft law on consultation because there has not been full consultation with all the

[2] Forest, Protected Areas and Wildlife Act, Decree No. 98-2007, art. 45.
[3] Property Act, Decree No. 82-2004, arts. 94, 100 and 102.
[4] Ibid., art. 100.
[5] Ibid., arts. 97-99.

indigenous organizations in the country. Various indigenous organizations have also put forward their own legislative proposals on prior consultation.

15. The Office of the National Commissioner for Human Rights informed the Special Rapporteur of its plan of action for the period 2014-2020, which sets out measures to support vulnerable groups, including indigenous peoples, providing greater access to the system of complaints and claims, reforms to that system and action to ensure coordination between State bodies and civil society to devise plans of action in support of vulnerable groups. Other objectives were to provide public officials, the private sector and civil society with human rights training and to monitor the public services and social programmes provided by central Government and municipalities. The Special Rapporteur was told that the Office had supported indigenous peoples in their complaints concerning land-related problems and indigenous individuals involved in criminal proceedings.

16. With regard to education, a presidential decision of 1994 recognized the "multicultural and multilingual nature of Honduran society" and established a national programme to promote intercultural bilingual education.[6] The General Subdirectorate of Education for Indigenous and Afro-Honduran Peoples is responsible for implementing this programme, which includes overseeing the training of indigenous teachers, developing educational materials and ensuring that in indigenous population centres education will be conducted "in the mother tongue by indigenous and specialized teachers, with a view to helping to preserve and strengthen the language, the world view and the identity of the indigenous peoples".[7]

17. The recent administrative reform and the establishment of various ministries do not seem to have resulted in any improvement in incorporating the rights of indigenous peoples into State activities, owing to poor coordination and institutional weakness.

## IV. Principal concerns

18. Indigenous peoples face systemic problems that hinder the full enjoyment of their rights. The lack of protection for their lands, territories and natural resources, together with impunity and inadequate access to justice, are fundamental problems that leave them totally defenceless in the face of acts of violence by various parties. They also suffer from a precarious social and economic situation of multidimensional poverty as a result of extreme inequality, corruption and the lack of basic social services.

### A. Violence and impunity

19. Honduras is one of the most violent countries in the world and indigenous peoples are drawn into this violence and general insecurity. According to various statistics, the homicide rate per 100,000 head of the population in Honduras was somewhere between 85.6 and 90.4 in 2012, and in 2014 it was about 68.[8] A person who becomes a human rights defender in Honduras stands an increased risk of falling victim to violence.

20. The murder of indigenous leaders who defend their lands, including a large number of leaders of the Tolupán, Garífuna, Lenca, Chorti and Pech peoples, is among the subjects that give rise to the most complaints to the Office of the Special Prosecutor for Ethnic

[6] Presidential Decision No. 0719-EP-94.

[7] Executive Decision No. 1359-SE-2014, art. 49.

[8] See Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras*, OEA/Ser.L/V/II, Doc. 42/15 (2015), paras. 32-34.

Groups and Cultural Heritage, in addition to cases of assault, attempted homicide and violence against indigenous women. The recent murder of the Lenca leader, Ms. Berta Cáceres, who headed protests against hydroelectric projects in the Lenca region (see annex), drew the attention of the world to this problem.

21. It is a matter of enormous concern that many of the indigenous leaders that have been killed, such as Ms. Cáceres, had been granted protective measures by the Inter-American Commission on Human Rights, with a view to protecting their lives and ensuring their personal safety. The murders have occurred despite a law on the protection of human rights defenders[a] adopted in April 2015, which establishes mechanisms to provide an institutional response to requests for protection for human rights defenders, including early warning measures at times of particular danger. Moreover, given the strong presence of the army and the military police in the country, evidence received about collusion by the police and the armed forces with private or business interests, including organized crime groups in indigenous territories, is worrying. All this exacerbates the violence and impunity suffered by the indigenous peoples.

22. The people with the largest number of murdered leaders is the Tolupán, with about 100 murders over the past decades. Members of the Tolupán tribe of San Francisco de Locomapa have reported the persecution, criminalization and murder of persons who have opposed logging, mining or hydroelectric activities on their lands, to which they have held title since 1864. During a protest against mining activities, three leaders from Locomapa in Yoro were murdered in August 2013 by employees of a private company. Various Tolupán leaders from Locomapa had to flee their communities following threats. In December 2013, the Inter-American Commission on Human Rights issued protective measures, which called on the State to protect the lives and ensure the personal safety of members of the tribe and their families.

23. Yet the threats and violence continue. Those responsible for the three killings in 2013 remain at liberty, despite the fact that warrants for their arrest were issued. In April and August 2015, two Tolupán leaders from Locomapa were murdered. In February 2016, a Tolupán leader from Locomapa and four peasant farmers were murdered, allegedly by professional killers hired by local economic interests. Those murders, too, remain unpunished.

24. Information was also received about the violence suffered by the Tolupán of the Candelaria tribe over a conflict with landowners. The Special Rapporteur heard a statement from a Tolupán woman whose children and other family members were murdered, abducted, threatened or assaulted in connection with this conflict, so that she was forced to leave her community in order to lodge a complaint.

25. Members of the Lenca people in Santa Elena in La Paz Department who oppose the Los Encinos hydroelectric project face violence, persecution, threats and murder at the hands of members of the security forces and persons connected with the project. In 2015, there were reports of a number of murders of Lenca in connection with this conflict and also attacks against women and children. In December 2015, a young Lenca man who was related to leaders opposed to the project was murdered. The previous month, the Inter-American Commission on Human Rights had issued protective measures under which it had ordered measures of protection for Lenca leaders opposed to the project and their families.

[a] Act on the Protection of Human Rights Defenders, Journalists, Media Professionals and Justice Officials, Decree No. 34-2015.

26. Indigenous peoples are also vulnerable to violence due to drug trafficking, organized crime and the subsequent response by the State. In May 2012, four members of the Miskito community of Ahuas, including pregnant women, died and others were wounded in an anti-drug operation conducted by officials from Honduras and the United States of America. The survivors of the attack and the families of the victims rebutted the official version that the persons in the boat carrying them had fired at the officials. Efforts have been made, without success, to obtain appropriate compensation and justice from both Governments.

27. In December 2015, in Iriona in Colon Department, two young Garifuna men were killed by military personnel who fired without provocation at vehicles carrying unarmed persons, because they suspected them of being drug traffickers. This incident outraged the Garifuna, who demanded the withdrawal of military forces from their lands.

28. The lives of the Tawahka people are at great risk as a result of the activities of livestock farmers, loggers and drug traffickers, who buy and sell illegally on their lands. It is reported that entire Tawahka communities have fled their lands and that the physical and cultural survival of the Tawahka people is under threat.

29. Problems relating to the trafficking and prostitution of indigenous women and children, as part of organized crime activities in or around the indigenous territories, were also reported.

## B. Access to justice

30. The indigenous peoples complained of the lack of access to justice to enforce their rights. One basic problem is that justice officials are ignorant of the rights, cultures and languages of the indigenous peoples, in addition to the racism and discrimination that such peoples have historically suffered. Other basic, widespread problems include the lack of institutional capacity to investigate crimes and the serious lack of independence of the judiciary. This has resulted in a structural impunity, which, according to official figures, affects 80 per cent of cases of homicide committed in Honduras, while, according to civil society organizations, the figure is as high as 98 per cent.[10] The lack of confidence in the national justice system became apparent in relation to the investigations into the death of the Lenca leader, Ms. Berta Cáceres, when there were calls for the establishment of an international commission of independent experts to monitor the investigation carried out by the national authorities.

31. Mention should also be made of the abuse of the justice system by individuals and State officials who lay claim to the lands and natural resources of indigenous peoples. This has resulted in the criminalization of indigenous individuals, who, owing to the absence of effective mechanisms to obtain justice, have resorted to peaceful protests. In that context, a number of sources report that at least 27 indigenous leaders have been tried for such offences as appropriation of land and damage to private property, among others.[11] This situation reinforces the perception that the justice system does not benefit indigenous people.

32. Attention should be drawn to the important role that could be played by the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage as a mechanism for obtaining access to justice. However, it was clear to the Special Rapporteur that the Office lacked the financial and human resources to carry out its functions. A number of court cases

[10] Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (see footnote 8 above), paras. 263 and 277.

[11] Ibid., para. 78.

brought by the Office may be mentioned. In one case, a member of the armed forces was convicted in December 2015 of killing the Lenca leader Mr. Tomás García during a peaceful demonstration against the Agua Zarca project and a decision on whether others should also be prosecuted remains pending. In November 2015, a member of the armed forces was indicted for issuing threats against the Tolupán in Locomapa and causing damage. In July 2015, an application was made by the Public Prosecution Service to prosecute settlers in Auka and an arrest warrant and eviction orders were issued against them. Criminal prosecutions were also initiated against military personnel responsible for killing Garifunas in Iriona in December 2015. The effectiveness of these prosecutions depends on follow-up and implementation by the relevant judicial and police authorities. The fact is, however, that the Office and other bodies require more resources to address the large number of complaints of offences against indigenous people.

33. With regard to the local administration of justice, there have been complaints about the politicization of the appointment of judicial officials and about some cases where persons involved in drug trafficking, in La Mosquitia for example, avoid justice for offences against indigenous people by bribing judges, prosecutors or police officers. This has resulted in the deaths of indigenous people who have lodged complaints against drug traffickers with the local authorities. Representatives of the indigenous peoples said that justice officials in regions with a high indigenous population, such as La Mosquitia, should be members of an indigenous community and should be subject to oversight by their own community.

34. The indigenous peoples also call for respect and recognition for their own judicial systems and authorities. For example, the Miskito representatives expressed their wish to establish some form of coordination between the Honduran judiciary and the justice officials of Miskito territorial councils, so that the councils could decide cases at the community level, in accordance with customary law.

## C. Lands, natural resources and governance

35. During the colonial era and at the beginning of the republican era, some indigenous peoples obtained communal property rights. A number of Tolupan and Pech communities obtained rights over their ancestral lands in the middle of the nineteenth century. During the course of the twentieth century, some communities obtained title or statutory usufruct and occupation under the agrarian system. Following the indigenous demonstrations of the 1990s, the number of property rights granted to collective indigenous lands increased. According to the data of the National Agrarian Institute, 505 titles were issued to indigenous communities between 1993 and 2015, covering an area of 1,322,774.50 hectares.

36. The property rights granted in the 1990s include those to the Lenca lands in the first indigenous municipality, San Francisco de Opalaca, which was established in 1994, and those to the Tawahka communities in the Tawahka Asangni Biosphere Reserve, set up in 1999 for the protection of the Tawahka people and of biodiversity, which is managed jointly by the Government, the local municipalities and the Tawahka.[12]

37. The process of granting title to the Miskito lands began in 2010 under a registration programme financed by the World Bank and implemented by the National Agrarian Institute and the Property Institute. A legislative decree was issued in 2013 to grant a number of Miskito and Garifuna communities within the Rio Platano Biosphere Reserve

[12] Decree No. 157-99, arts. 2, 5, 12 and 16.

title to their lands.[13] In the case of the Miskito, title has been granted to a number of separate territorial councils made up of various communities in accordance with their own form of territorial organization. The National Agrarian Institute reports that 1,099,701.59 hectares have been made over to 11 of the 12 existing territorial councils.

38. Representatives of the indigenous peoples provided information on applications for title that are still pending, as in the case of the Nahua and Pech communities in Olancho, and on applications to extend the title of Garifuna, Tolupán, Tawahka and Pech communities to include their working habitats. In the case of the Maya Chorti people, the Government signed an executive agreement in 1997 undertaking to acquire 14,700 hectares to be registered in the name of the Chorti communities in Copán and Ocotepeque Departments. To date, however, only 4,995.74 hectares have been made over. The Chorti have repeatedly urged the Government to provide the necessary budget for the purchase and registration of their lands in order to meet its commitments in full. The Special Rapporteur has learned that, in some cases, the failure to meet these commitments has made it possible for private individuals to obtain judicial orders to evict Chorti communities living on their ancestral lands.

39. Representatives of the indigenous peoples claimed that, even when they have title to their lands, they face counterclaims from individuals who seek to break up the indigenous lands by launching legal and administrative procedures and by buying land illegally sold by indigenous individuals. Some municipal authorities have been involved in the illegal sale of indigenous lands and have approved or participated in logging, mining or agricultural activities on those lands. The communities with title to their land who face this kind of problem include the Lenca of Lepaterique and Llanos de la Candelaria and also Tolupán tribes in Yoro that have held title to their land since the nineteenth century. In La Mosquitia, the problem is also linked with drug trafficking and money-laundering activities.

40. An upgrade to their title to their lands is urgently required in order to deal with the presence of third parties on registered lands. Members of the Miskito community of Auka, part of the Wamakklisinasta Territorial Council, registered in 2013, have reported that settlers have been illegally granted title and other permits on their lands by municipal authorities or obtained them through illegal sales. Owing to the outsiders' ranching or drug trafficking activities, the Miskito lands have been deforested and members of the community can no longer reach traditional agricultural or hunting lands. This has given rise to food insecurity and health problems and death threats have been directed at community leaders.

41. In March 2015, following the failure to achieve the territorial upgrading that they had repeatedly sought, members of the community took 27 settlers prisoner. The Government sent a special commission to resolve the situation and an agreement was signed between representatives of the community, the Miskito people, the departmental government, the Ministry of Human Rights and the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage, under which, in exchange for the release of the settlers, the Government undertook to investigate and punish those responsible for the sale of lands and the environmental destruction, to finalize the upgrading process and to return the settlers to their places of origin. Another component of the agreement was the Government's invitation to the Special Rapporteur to pay her visit to Honduras.

42. Once the agreement had been signed, some settlers left the territory and the National Agrarian Institute and other institutions carried out preliminary investigations on the ground. However, apart from the visit of the Special Rapporteur, the members of the community reported that they had been given no details of the implementation of the other

[13] Decree No. 61-2013.

provisions of the agreement nor of a decision on the criminal charges of abduction against the members of the community that had taken the settlers prisoner. They also said that the number of settlers in the area had increased in recent months. For its part, the Government said that it had decided to compensate the settlers so that they would leave the occupied lands and was awaiting approval for the necessary budget from the relevant authorities.

43. In addition to seeking the registration and upgrading of their lands, the indigenous peoples demanded recognition and reinforcement of their own systems of governance, which means recognition of their institutions and their management of their natural resources, the exercise of their traditional systems of justice and the resources needed to perform those functions. Representatives of the indigenous peoples said that receiving title to their lands did not lead to a recognition of their right to manage their natural resources.

44. Government representatives stated that various international donors had expressed interest in supporting programmes to strengthen indigenous governments and their management of their lands and natural resources. Representatives of indigenous peoples, meanwhile, have tried to incorporate guarantees on territorial rights and governance into the negotiations between Honduras and the European Union on Voluntary Partnership Agreements under a European Union initiative on Forest Law Enforcement, Governance and Trade. The aim of the initiative is to stop illegal logging and improve forest governance at the global level.

## D. Investment projects

45. The indigenous peoples stated that various energy projects, and also extractive, agro-industrial, tourism and infrastructure projects, had infringed their rights. They maintained that these activities had been conducted without due observance of international standards on prior consultation. In many cases, there had been disclosure or consultation only once a licence had been granted.

### 1. Energy projects

46. In recent years, the Government of Honduras has promoted an energy policy relying on renewable energy sources in the form of hydroelectric and wind projects, among others, with a view to reducing the use of fossil fuels. In 2010, 40 contracts were approved under a legislative decree on hydroelectric projects. Of these, 21 would affect Lenca, Garifuna, Pech, Tawahka, Miskito and Tolupán communities, which had not been consulted.

47. One of these projects was the Agua Zarca dam in the Río Blanco region in Intibucá, which led to an extremely divisive situation involving threats, harassment, criminalization and the murder of indigenous Lenca leaders opposed to the project. The Special Rapporteur has included some comments on the situation in Río Blanco in the annex to this report.

48. The Special Rapporteur was informed about other dams on which there had been no consultation and which would affect Lenca communities, including those of San Rafael, Chinacla, Gualcarque and Los Encinos. Some four dams that would affect various Tolupán tribes in Yoro are set to be built without prior information or consultation. According to the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage, proceedings have been initiated for the offence of abuse of authority against officials who issued environmental licences for various hydroelectric projects without having undertaken previous consultation, including the Agua Zarca project, the La Aurora project, which would affect sources of water serving Lenca communities in La Paz, and a dam on the river Wampu, which would affect the Pech people.

49. Another controversial project is the Patuca I, II, and III series of dams in La Mosquitia. The construction of the Patuca III dam has started in Olancho Department and

its reservoir has affected non-indigenous populations. This has resulted in the illegal settlement of Tawahka lands because there is no proper plan for resettling these populations. It is a matter of serious concern that the network of dams is affecting the water level of the rivers used by the Tawahka and Miskito communities for their livelihood and as a means of transport and that it is flooding their ancestral forests. The Special Rapporteur was informed that no appropriate consultations with these indigenous peoples had been held and that there had been no proper studies to assess the impact on their territorial rights.

50. She also received information about the construction of the Cerro de Hula wind-farm project in Santa Ana, Francisco Morazan Department, where it is claimed that the municipal authorities and the environmental authority did not consult the local Lenca communities. According to this information, the development company persuaded indigenous individuals to sign agreements leasing their lands, warning them that, if they did not, their plots of land would be expropriated. The indigenous communities have claimed various forms of compensation from the company for environmental damage caused by the project. Their claims have not been addressed and it is feared that further environmental damage could be caused if the project is extended to neighbouring municipalities inhabited by indigenous communities.

### 2. Extractive, agro-industrial, tourism and infrastructure projects

51. Complaints were also made about the increase in the number of mining concessions in Honduras, including those for opencast mining. According to the information provided, about 97 licences have been granted for the extraction of metals and 193 for the extraction of non-metal products, while over 500 mining projects are awaiting approval or are at the application stage.

52. Government representatives stated that the granting of concessions or licences for mining projects was dependent on consultations with and support from local communities. The General Mining Act of 2013, however, provides that public consultations must be conducted before mining permits are granted, which may take place after the granting of prospecting and exploration rights, when there already exists a contractual relationship between the Government and a company.

53. Representatives of indigenous peoples said that mining projects had been carried out without prior consultation, including the Cuaca I, II and III projects in Olancho, which would affect the Nahua people, and the antimony mining operations in Locamapa, in Yoro, which would affect the Tolupán people. They also mentioned the mining operations in the basin of the Patuca river conducted by foreigners without government authorization or the consent of the Tawakha people.

54. Another concern is the contract signed in 2013 between the Government and British Gas to explore and mine hydrocarbons in an area of more than 35,000 square kilometres on the coast of La Mosquitia without consultation with the indigenous peoples of the region. Following protests by the Miskito people, the Government and British Gas initiated a consultation process with representatives of the Miskito people, who had drawn up a "biocultural protocol" as a basis for the consultations. The focus of the consultations was the conditions and guarantees demanded by the Miskito for the protection of their rights, including impact studies, financial contributions during the exploration stage and another round of consultations before any drilling work or mining operations started. The Special Rapporteur was told that there had been no similar consultation procedures with other indigenous peoples potentially affected by hydrocarbon operations. Government representatives said that the experience acquired during the negotiations with the Miskito people regarding oil production, which had not yet resulted in an agreement, would serve as a basis for future consultations with indigenous peoples on mining projects.

55. The indigenous peoples of the Atlantic seaboard and La Mosquitia have been affected by agro-industrial projects, principally the cultivation of the African oil palm, which have been promoted by powerful economic sectors. It is reported that the Garifuna community of Nueva Armenia in Atlántida has been subjected to threats and assaults and its houses and crops destroyed by private individuals who wish to plant oil palms on lands claimed by the community. There have also been reports of conflicts relating to tourism projects in lands to which the Garifuna communities hold title or that they claim as ancestral lands, such as the Barra Vieja community in Atlantida, which has been affected by the Indura Beach Resort tourist complex and the Río Negro community, which has been affected by the construction of cruise ports on the Banana Coast in Trujillo Bay.

56. Another major concern is the proposed construction of model cities under the Organic Act on Employment and Economic Development Areas,[14] which would involve building infrastructure for areas having their own legal and economic system and their own security forces. The model cities would affect 24 Garifuna communities between the Sico river and Trujillo Bay and would involve forced displacement. The Special Rapporteur was informed of plans to relocate 3,500 members of the Garifuna community of Puerto Castilla to facilitate the construction and enlargement of infrastructure for a model city in Trujillo. Members of the community stated that they had not been consulted about the project and that they were opposed to their relocation, having been through two resettlement processes in the preceding decades.

## E. Protected areas

57. There are also concerns about the creation of protected areas that overlap with indigenous territories and the resulting restriction of access to their lands and natural resources. In the case of the Garifuna people, 26 out of 47 communities are located within or on the borders of protected areas. The creation of the Punta Izopo and Cuero y Salado national parks, among others, without prior consultation with the affected Garifuna communities, has placed serious restrictions on their fishing, hunting and gathering activities in these areas and, in some cases, has led to their eviction.

58. Representatives of the indigenous peoples stated that the joint management plans of the protected areas promoted by the Government did not recognize or protect the territorial rights of the indigenous peoples affected or their own ways of using and managing their natural resources. They report that, because they have no rights over the forests and other resources in the areas designated as protected within their territories, indigenous people have to pay the municipal and forestry authorities for permission to take wood to build their houses and engage in other traditional activities. In La Mosquitia and other regions, they complain that the police confiscate wood obtained by indigenous families and, in some cases, demand bribes. It is reported that members of Miskito communities have been imprisoned by the police after their wood has been confiscated or because they hunt animals for food.

59. Representatives of the indigenous peoples report that the establishment of protected areas has not prevented illegal logging, mining or drug trafficking on indigenous lands. That, they say, is the situation in the Río Plátano Biosphere Reserve, where the ancestral lands of the Miskito are affected by logging and drug trafficking. The Tawahka people are in the same situation, following the creation of the Tawahka Asangni Biosphere Reserve.

[14] Decree No. 120-2013.

## F. Economic, social and organizational development

60. Honduras is considered a middle- to low-income country, with a high level of economic inequality and poverty. Although measures are in place to improve human development levels in the country, there remain problems to be overcome in such areas as access to health, education, gender equality and the environment. Such problems particularly affect the indigenous peoples. One problem that was raised was the lack of up-to-date official disaggregated data on indigenous peoples and their social and economic situation and on the effectiveness and cultural suitability of the social programmes implemented in indigenous regions.

### 1. Economic and employment situation and situation of women, young people and children

61. Seventy-two per cent of indigenous households, as against 41.6 per cent of households nationally, cannot afford a basic food basket, which puts them on the extreme poverty line. The worst percentages are found among the Tolupán (93.9 per cent), the Chorti (87.4 per cent) and the Pech (84.4 per cent). Of the indigenous child population, 88.7 per cent live in poverty, while more than 88 per cent of Tolupán, Lenca and Pech children live in extreme poverty. The unemployment rate among indigenous persons over the age of 18 years is 44.7 per cent. Women make up 83.6 per cent of unemployed persons. The average monthly income of indigenous people amounts to 36.8 per cent of the national average, and much less in the case of the Tolupán, Chorti, Pech and Lenca.[11] They also face discrimination, which makes them vulnerable to unfair and precarious working conditions.

62. Information was received about the Miskito divers who have died or been severely injured while lobster fishing. The Government has been urged for many years to pay compensation to victims and their families, to provide health services, grants and housing and to strengthen labour regulations, and a claim against it was lodged with the inter-American system. The Government provided information on its inspections of the ships that hire the divers, the installation of hyperbaric chambers in some areas, initiatives to regulate underwater fishing and the provision of social services for the divers and their families. It seems, however, that the available grants, housing and medical services are inadequate to meet the real needs of disabled divers and their families. The lack of economic opportunities and proper regulation has meant that the number of deaths or injuries to divers has risen.

63. One problem that came up again and again was the lack of services to provide indigenous persons with identity documents, without which they cannot obtain access to social services or exercise their civic rights. The families of Miskito divers who died without holding such documents did not receive the social benefits to which they would have been entitled.

64. Government representatives provided information on such social programmes as Better Life, which issues food, housing, environmentally friendly stoves and medicines, on the various benefits available for poor indigenous families and on the Indigenous and Afro-Honduran Peoples and Climate Change Programme, in addition to the assistance, school equipment and food that the Government provides for indigenous children. There have, however, been complaints that these programmes are totally inadequate, that political

[11] See United Nations Children's Fund (UNICEF), *Niñez indígena y afrohondureña en la República de Honduras* (Indigenous and Afro-Honduran children in the Republic of Honduras), Tegucigalpa, Dec. 2012, pp. 37-42.

favouritism has been shown in social programmes aimed at particular communities or families and that in some cases such programmes do not reach the indigenous communities.

65. The indigenous peoples also want backing for their own economic models and ideas and they wish to be the direct beneficiaries of a rational and sustainable use of the natural resources in their territories. A number of people said that the communities' loss of their lands and resources had resulted in a lack of opportunity for the younger generation, which meant that they became easy prey for organized crime groups or found themselves forced to emigrate.

## 2. Education

66. Illiteracy levels among the indigenous population are the same as those among the rest of the population (14.9 per cent) but much higher among Tolupán, Pech and Chorti women (29.5 per cent, 36.3 per cent and 39.6 per cent, respectively). The average number of years of schooling among the indigenous peoples is 5.7 years, as against a national average of 7.5 years, and, in the case of the Chorti, Pech, Tolupán and Lenca, under 5 years.[37] This is due to such factors as a lack of educational opportunities and social and economic pressures that lead indigenous boys and young men to abandon their studies so as to contribute economically to their families.

67. According to official data, there are 919 educational centres in indigenous and Afro-Honduran communities — 183 at pre-primary and 736 at primary level — catering for a total of 92,962 children. The centres are staffed by 4,019 teachers, who are trained in bilingual intercultural education. The aim is to develop the bilingual component in 424 of these educational centres, catering for 41,649 children in indigenous communities that have retained their language, while, in other centres, there will be an intercultural focus and indigenous words will be taught.

68. The General Subdirectorate of Education for Indigenous and Afro-Honduran Peoples is developing systems of indicators and evaluation of bilingual education, including tests of competence in the mother tongue. Over the past decade, educational materials have been written in the Miskito, Garifuna, Pech, Tawahka, Tol, Lenca and Chorti languages. A teacher training programme between 2007 and 2012 led to the training of 2,578 teachers in bilingual intercultural education. There are also plans for bilingual intercultural education to be taught at university level.

69. Representatives of the indigenous peoples stated that there remained problems in the education provided in their communities, owing to a shortage of materials, staff and infrastructure. In La Mosquitia, they emphasized the state of disrepair of the schools and the lack of secondary and higher education centres. They said that the neglect of many indigenous regions meant that the quality of education was very poor and that, owing to the lack of resources in schools, parents were asked to pay for equipment and other materials. Another repeated concern was the lack of employment opportunities for trained indigenous teachers, in view of the fact that appointment to such posts seemed to be politically motivated.

70. Representatives of the indigenous peoples also spoke about the challenges involved in putting bilingual intercultural education into practice. They said that in La Mosquitia, where most students spoke their indigenous language, education was in Spanish. They also called for greater support for communities that had lost their indigenous language and wished to regain it. Moreover, they said that national educational textbooks did not contain

[37] Ibid., pp. 43 and 44.

information on the indigenous peoples, their languages, their cultures or their contributions to the country.

### 3. Health

71. The health situation of the indigenous peoples of Honduras is precarious, owing to such factors as poverty, discrimination, geographical isolation and the lack of proper health services in the indigenous communities.

72. According to the available figures, neonatal mortality — that is, of children under 12 months old — is 43.5 per 1,000 live births among indigenous children, which is higher than the national average of 35.1 per 1,000, while infant mortality — of children under 5 years of age — is 62.9 per 1,000, higher than the national average of 49.7 per 1,000. The main causes of death include preventable diseases such as pneumonia, parasitic diseases and malnutrition. Chronic malnutrition affects 38 per cent of the indigenous child population under the age of 5 years, as against the national average of 30 per cent. The level is over 55 per cent among Lenca, Tolupan and Chorti children. Among the adult population, life expectancy varies from people to people. For example, it is 52 and 57 years, respectively, for Tolupan men and women and 38 and 43 years, respectively, for Tawahka men and women. The national average is 65 and 70 years, respectively, for men and women. Indigenous children and adults suffer from a high rate of respiratory infections, malnutrition, diarrhoea, malaria, dengue fever, tuberculosis and Chagas' disease. There are high levels of HIV/AIDS among the Garifuna, Miskito and Tawakha populations.[17]

73. The Special Rapporteur was informed that indigenous people used State services such as rural health centres and dental centres in or near their communities and also public and private clinics and hospitals outside their communities. A significant number of people decided not to seek medical care (13 per cent, according to one survey) or preferred to obtain it in their own homes or communities (5 per cent). It has been reported that an average of 96 per cent of indigenous communities have access to practitioners of various kinds of traditional medicine.[18]

74. The Special Rapporteur heard numerous statements on the lack of facilities, staff and medicines at health centres in indigenous territories and on the social and economic factors that hinder access to health. In La Mosquitia, the representatives of the indigenous people called for more health centres in their communities and a regional hospital. They said that the shortage of staff and proper medical care in the region had led to an increase in maternal mortality and in the number of people who had resigned themselves to dying because they could not meet the costs of transport and medical treatment in distant population centres. They reiterated the need for the State to build roads in a number of areas in order to improve access to health services and other necessities. The Special Rapporteur was told that, in the Lenca region, lack of access to medical services forced some people to go to health centres in El Salvador.

75. Another problem that was reported was the lack of respect for ancestral health practices and the lack of coordination with health officials in accommodating such practices and indigenous world views on health.

[17] Ibid., pp. 51–57. See also OHCHR, Regional Office for Central America, *Diagnóstico sobre la situación de los derechos humanos de los pueblos indígenas de América Central* (Nov. 2011), pp. 303–305.

[18] Alejandra Lainidez Meléndez and Marcos Valdés Castillo, *Caracterización de la población indígena y afrodescendiente de Honduras*, report by the Programme for the Comprehensive Development of Indigenous Peoples/Honduran Social Investment Fund (2011), pp. 36–37.

### 4. Organizational capacity, communication media and cultural heritage

76. The Special Rapporteur observed serious divisions among the organizations representing indigenous peoples. Indigenous leaders repeatedly claimed that the State authorities and other parties had promoted divisions among the indigenous peoples by setting up parallel indigenous organizations or by exercising undue influence over indigenous leaders, thereby causing mistrust in the communities and weakening the defence of their rights and interests.

77. The indigenous peoples also protested at the lack of support for their own communication media, in particular their community radios. They criticized harassment by the State authorities of the Lenca and Garifuna community radio stations, presumably on account of the role that these stations played in promoting the rights of indigenous peoples. It is a matter of concern that regulations on telecommunications place an undue burden on community radio stations, so that they are forced to close.

78. Another topic that arose was the right of indigenous peoples to participate in the management of ancestral heritage sites run by the Government or international institutions and to enjoy the related benefits. The Special Rapporteur was told of the work done in this regard by the Chorti people at the Maya archaeological park in Copan and the work of the Pech, Tawahka and Miskito peoples in Ciudad Blanca.

## V. Conclusions and recommendations

79. **The situation of the indigenous peoples of Honduras is critical, since their rights over their lands, territories and natural resources are not protected and they face acts of violence when claiming their rights.**

80. **They call for immediate and decisive protection measures, including the prevention, investigation and punishment of persons responsible for murdering, threatening and harassing members of indigenous peoples and of those responsible for actions that infringe their rights over their lands, natural resources and other human rights. The legal, political and institutional framework must be overhauled and strengthened in order to deal with the situation properly and effectively, with reforms including coordination between government agencies to ensure the cross-cutting implementation of the Government's international commitments on the rights of indigenous peoples.**

81. **All this requires more public resources and greater political will. Serious and committed participation by the international community and the international human rights bodies is also essential in order to ensure international oversight of such efforts and provide the necessary technical and financial assistance.**

#### Legal, political and institutional framework

82. **All the State agencies dealing with the indigenous peoples, in particular the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage and the Directorate of Indigenous and Afro-Honduran Peoples, should be significantly strengthened and provided with the resources required to meet the needs of the indigenous peoples as regards access to justice, protection of their lands and natural resources and other rights. Another key institution requiring more resources is the Office of the National Commissioner for Human Rights, if the important aims set out in paragraph 15 of its Plan of Action are to be achieved.**

83. **Public officials and the private sector should be given education and training in the international standards on the rights of indigenous peoples, with a particular focus**

on mayors, local and national justice officials and members of the police, the armed forces and private security forces. This should be accompanied by effective procedures for monitoring, supervising and assessing public and private officials on their respect for and implementation of these international standards.

84. It is recommended that consultations be held with the widest possible range of representative bodies of the country's indigenous peoples on the various legislative and public policy initiatives relating to indigenous peoples (paras. 12 to 17) and that their own legislative and policy proposals should be considered. Under article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, consultations must be held on such legislative or other measures in order that the free, prior and informed consent of indigenous peoples is obtained before their adoption.

85. Honduras must examine the compatibility of current legislation and policies in the areas of property, natural resources, mining, hydrocarbons, energy projects, model cities, tourism, protected areas, forest issues and agro-industry with the country's international obligations on indigenous peoples, taking into account the constitutional status of international human rights instruments. The implementation of the law should not be to the detriment of the rights contained in the international instruments on indigenous peoples. Reforms or amendments to the law should be made in consultation with the indigenous peoples, in accordance with international standards.

Violence, impunity and access to justice

86. More resources are needed to strengthen the justice system for the investigation, prosecution and punishment of State officials or individuals responsible for the murder of members of the indigenous peoples and other forms of violence, including violence against indigenous women and children. This should include the investigation and punishment of members of the police, the armed forces and private security forces who commit such acts of violence.

87. It is recommended that Honduras engage in special investigations and impose criminal sanctions in particularly serious cases, such as the situation of Tolupán in Locomapa (para. 22), targeting not only those responsible for the killings but also the land issues that lie behind the violence against the Tolupán. With regard to the murder of Ms. Berta Cáceres, it is recommended that the Government request and accept technical assistance from international bodies and independent experts, as Ms. Cáceres' family and representatives of indigenous organizations and civil society have asked.

88. Criminal policy should take account of the causes underlying the protests over land and the other claims by indigenous peoples, with a view to promoting solutions to these causes and not imposing unnecessary or excessive punishments on indigenous demonstrators.

89. Mechanisms for the protection of human rights defenders, including those granted protective measures by the Inter-American Commission on Human Rights, should be extended, strengthened and given the necessary resources to cover indigenous leaders and their families who are dedicated to the defence of their peoples' rights. Protective measures should be developed in consultation with the indigenous persons concerned. Effective early warning systems should be established and urgent action taken jointly with indigenous peoples to prevent attacks against members and leaders of the indigenous peoples.

90. With regard to the drug trafficking and organized crime found on indigenous lands, security measures must be developed in consultation with the peoples

concerned to protect their lives, personal safety, lands and cultures. Particular attention should be paid to the situation of indigenous women, children and young people.

91. Indigenous peoples that might be affected should be consulted on anti-drug policies and operations that involve the presence of national or foreign police or armed forces and guarantees should be given that the lives, cultures, lands and natural resources of the indigenous peoples are not violated as a result of such operations. Abuses committed by drugs squad officials must be investigated and punished. In the case of the massacre in Ahuas (para. 26), the necessary measures should be taken at the national and international level to ensure that the victims and their families obtain justice and fair and appropriate compensation.

92. The Special Rapporteur recommends that, in regions with large indigenous populations, justice officials should be given more training in the rights of indigenous peoples and in the local indigenous languages and cultures. Measures must be developed, in cooperation with the indigenous peoples of those areas, to facilitate the appointment of justice officials, preferably from indigenous communities, and the activities of such officials should be subject to oversight by the indigenous peoples themselves.

93. She also recommends legislative or other measures to recognize indigenous systems of justice and courts and to develop mechanisms for coordination between indigenous and ordinary courts.

### Land, natural resources and governance

94. Honduras should redouble its efforts to respond to existing requests by the indigenous peoples with regard to the delimitation, demarcation, registration, expansion and upgrading of their lands. It should comply with the commitments agreed with the Chorti people with regard to the acquisition and registration of lands and meet the requests of the Garifuna, Tawahka and Tolupán peoples, among others, for the expansion of their registered lands (paras. 35-44). As stated in ILO Convention No. 169, article 13 (2), recognition of their lands should include not only the areas in which they are settled but also the "total environment of the areas which the peoples concerned occupy or otherwise use". Moreover, the indigenous peoples have the right to participate in the use, management and conservation of the natural resources pertaining to their lands (art. 15 (1)).

95. Judicial and agrarian institutions and the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage should take coordinated action to develop and strengthen specialized permanent mechanisms to enable the indigenous peoples to lodge their claims and obtain compensation for violations of their rights over their lands and natural resources, in accordance with articles 12 and 14 of ILO Convention No. 169 and articles 27, 28 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples. This should include measures for the prompt settlement of cases in which third parties have been granted title to indigenous lands and for the prevention and punishment of the break-up and illegal sale of indigenous lands.

96. Prompt and effective measures should be taken to upgrade registered indigenous lands and to investigate and punish persons responsible for the occupation and environmental degradation of indigenous territories. In addition, the agreement signed with the Auka community should be implemented immediately and in full in order to avoid a deterioration in this divisive situation.

### Investment projects

97. The indigenous peoples must be included in national development planning and energy policy, taking into account international standards on the protection of their cultures, lands and traditional resources. Prior consultation and free, prior and informed consent are essential in this regard. Social, cultural, environmental and human rights impact studies must be carried out and an agreed definition of mitigation, compensation and benefit measures must be reached. International standards apply in the case of energy projects, and also extractive, agro-industrial, tourism and infrastructure projects, model cities and other projects that affect or may affect indigenous peoples.

98. With regard to the Patuca III project and other energy and investment projects (paras. 46 to 50), the Special Rapporteur considers that there must be appropriate prior consultation to provide the indigenous peoples with accessible information on the social, environmental and cultural impact of those projects and possible measures of mitigation, compensation and benefits. No project should proceed until guarantees have been honoured and the free, prior and informed consent of all the indigenous peoples affected has been obtained. Indigenous peoples whose lands, natural resources or other rights have been violated by the implementation of such projects should obtain justice and compensation.

99. The private sector, meanwhile, has the obligation to exercise due diligence and assess the real and potential impact of its activities on human rights before undertaking operations. The corporate responsibility to respect human rights exists independently of a State's ability or willingness to fulfil its own human rights obligations and it exists over and above compliance with national laws and regulations protecting human rights.[10] Before applying for permission or signing contracts relating to investment projects, companies should carry out studies on the presence of indigenous peoples in or around sites proposed for such projects and on the rights to lands, natural resources and prior consultation that indigenous peoples have under international standards.

### Protected areas

100. The creation of protected areas also requires prior consultation, the consent of the indigenous peoples directly or indirectly affected and due regard for their rights under national and international law. The management of existing or proposed protected areas should be conducted with the full and effective participation of the indigenous peoples affected, respecting their own forms of use and management of natural resources in their ancestral territories. The Special Rapporteur urges that the necessary measures be taken to facilitate access to and use of their lands and natural resources by the indigenous peoples in areas that are currently protected, free of charge and without penalty.

### Economic, social and organizational development

101. Census information on the indigenous population and its social and economic situation must be updated and systematized and methods to evaluate the scope and effectiveness of social policies and programmes targeting indigenous peoples must be developed, taking into account also the situation of indigenous women and children.

[10] See the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex).

Programmes to provide indigenous people with identity documents should also be extended.

102. In consultation and coordination with indigenous authorities and organizations, appropriate measures should be taken to improve the development and implementation of education, health and economic development programmes and policies in indigenous territories and to allocate more resources for this purpose. This includes measures to extend educational and health coverage, with the necessary infrastructure, equipment and staff. The effective implementation of bilingual intercultural education must be assured in order to strengthen and, where necessary, recover indigenous languages. National textbooks should include specific information on indigenous peoples, their rights, cultures, languages and contributions to society. Measures should be developed to recognize ancestral health practices and incorporate them into health services in indigenous regions.

103. The Government should provide resources to enable the indigenous peoples to develop and implement their own economic models and initiatives. It is also recommended that measures be taken to support and promote communication media for the indigenous peoples. Moreover, it is essential that the indigenous peoples should participate fully and effectively in the management and spin-off benefits of their ancestral heritage sites.

104. The Special Rapporteur urges the Government to adopt the necessary measures to regulate and monitor effectively underwater fishing and to address the demands of Miskito divers and their families for health services, other necessary social services and compensation.

105. The necessary resources should be allocated to enable the indigenous peoples to develop their organizational capacities with regard to their own structures, cultures and autonomy. Activities that divide indigenous peoples and organizations must be avoided. Moreover, the existence of internal divisions should not be a pretext for not adopting measures to resolve the human rights problems affecting the indigenous peoples.

### Other recommendations

106. The Special Rapporteur recommends that the Government, donor countries and business partners promote and implement initiatives in support of the rights of the indigenous peoples of Honduras, in consultation with them, in particular with regard to their lands, natural resources, governance, social and economic development and organizational capacities. To that effect, they should ensure that the Voluntary Partnership Agreement under the Forest Law Enforcement, Governance and Trade initiative (para. 44) and the private initiatives that they promote in Honduras guarantee the rights of the indigenous peoples and their participation.

107. It is also recommended that the United Nations agencies in Honduras, including the OHCHR representation in Honduras, should, in cooperation with the Government and the indigenous peoples, provide the State with technical assistance to implement the recommendations made in this report. The United Nations agencies should also ensure that they consult the indigenous peoples when planning and implementing programmes and activities in Honduras, in cases where such activities may have some impact on the indigenous peoples' rights and interests.

# Anexo

## Observaciones sobre la situación de Río Blanco

### I. Introducción

1. La Relatora Especial sobre los derechos de los pueblos indígenas, Victoria Tauli-Corpuz, presenta sus observaciones y una serie de recomendaciones sobre la situación en la región de Río Blanco, Intibucá en Honduras a raíz de la aprobación e inicio de construcción del proyecto hidroeléctrico Agua Zarca y su impacto sobre los derechos humanos de miembros y comunidades del pueblo indígena lenca. Las observaciones se basan en la información recabada por la Relatora Especial durante y después de su visita a Honduras llevada a cabo del 2 al 10 de noviembre de 2015. El presente documento complementa el informe sobre la situación de los pueblos indígenas de Honduras ("informe de país") que será presentado por la Relatora Especial al Consejo de Derechos Humanos en septiembre de 2016.

2. La situación de Río Blanco ha llamado la atención internacional debido al asesinato, ocurrido el 3 de marzo de 2016, de la reconocida líder lenca Berta Cáceres quien encabezó protestas contra el proyecto Agua Zarca. Desde un principio ha preocupado que su labor de defensa de los derechos del pueblo lenca, particularmente en relación con este proyecto, haya sido la causa de su asesinato. Las investigaciones en curso hasta el momento han tenido como resultado la captura de cinco personas que han sido acusadas por el crimen, algunas con vínculos directos con la empresa desarrolladora del proyecto.

3. El caso de Río Blanco es emblemático de la situación de violencia, impunidad y falta de acceso a la justicia que amenaza a los pueblos indígenas de Honduras, particularmente en relación con proyectos de inversión. El presente informe analiza la información recibida sobre el proyecto Agua Zarca en el marco de la visita a Honduras,[1] las numerosas denuncias recibidas sobre el accionar de funcionarios locales y nacionales, agentes policiales y militares, empleados de la empresa desarrolladora y personas favorables al proyecto, y la investigación del asesinato de la Sra. Cáceres. Asimismo, analiza los estándares aplicables respecto a los derechos de los pueblos indígenas y la responsabilidad empresarial, y concluye con una serie de recomendaciones dirigidas al Estado, las empresas e instituciones financieras.

4. El objetivo primordial del informe es llamar la atención del Gobierno de Honduras, el sector empresarial del país, los países donantes, y las instituciones internacionales financieras sobre los impactos generados por proyectos de inversión sobre las tierras, recursos naturales, culturas, espiritualidad, convivencia social y las vidas e integridad personal de los pueblos indígenas de Honduras. Por ello, se espera que se adopten medidas decididas y eficaces para evitar la repetición de sucesos similares en Honduras, y para garantizar justicia y reparación en los casos de violaciones cometidas contra dirigentes y miembros de los pueblos indígenas en el contexto del desarrollo de proyectos de inversión.

[1] La situación de la represa Agua Zarca también fue objeto de una comunicación dirigida al Gobierno de Honduras por parte del anterior Relator Especial. *Ver*, Report on the observations to communications sent and replies received by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya – Observations on communications, A/HRC/27/52/Add.4, (3 de septiembre de 2014), parrs. 106-108. Disponible en: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.52.Add.4.doc

# II. Antecedentes

**Aprobación y primera fase del proyecto**

5. El proyecto Agua Zarca es parte de una serie de alrededor de 40 proyectos hidroeléctricos (21 de los cuales afectarían a comunidades lencas, garífunas, pech, tawahka, miskitas y tolupanes) cuyos contratos se aprobaron mediante un decreto legislativo de septiembre de 2010 que no fue consultado previamente con los pueblos indígenas concernidos. La aprobación de estos contratos fue antecedida por reformas legislativas en 2009 y 2010 que permitieron las concesiones de recursos hídricos a favor de terceros y la derogación de normas nacionales que anteriormente prohibían los proyectos hidroeléctricos en áreas protegidas. Esto se produjo en el contexto de una política estatal a favor de fuentes de energía renovables que apoyaba la realización de proyectos hidroeléctricos o eólicos, entre otros.

6. El proyecto hidroeléctrico Agua Zarca supone una concesión de 20 años a favor de la empresa hondureña Desarrollo Energéticos S.A. (DESA). La información pública al inicio del proyecto indicaba que se desarrollaría en el municipio de San Francisco de Ojuera, departamento de Santa Bárbara. El proyecto tendría una capacidad de 14,46 a 21,3 megavatios, según distintas fuentes, y utilizaría las aguas del río Gualcarque. La empresa DESA contrató a la empresa china SINOHYDRO para realizar la construcción de la represa. En 2012, el Banco Centroamericano de Integración Económica (BCIE) destinó 24,4 millones de dólares al proyecto mediante una inversión estructurada con el Banco Holandés de Desarrollo (FMO) y el Fondo Mezzanine de Infraestructura para Centroamérica (CAMIF)[8]. El CAMIF es un fondo de capital privado que invierte en empresas y proyectos de tamaño mediano en Centroamérica y otros países. Entre los principales contribuyentes al CAMIF se encuentra la Corporación Financiera Internacional (CFI), perteneciente al grupo Banco Mundial.

7. En 2011, DESA comienza a adquirir tierras en la región de Río Blanco, municipio de Intibucá, departamento de Intibucá, supuestamente de propiedad privada y municipal, para la construcción de la represa. Sin embargo, las tierras eran parte del territorio ancestral de comunidades lencas de Río Blanco, que incluyen las comunidades de La Tejera, El Barreal, Valle de Ángeles, La Unión, San Bartolomé, El Naranjo, San Pedro y San Antonio. A principios del siglo XX, las tierras fueron reconocidas como tierras colectivas ejidales a título del municipio de Intibucá, que históricamente ha tenido una población predominantemente indígena. Esta designación se debió a los esfuerzos de la familia del Presidente Luis Bográn para beneficiar a las comunidades lencas de Río Blanco que históricamente se enfrentaron a pretensiones de familias no indígenas del vecino municipio de San Francisco de Ojuera, Santa Bárbara, que querían apoderarse de sus tierras. También se ha informado sobre la existencia de títulos antiguos a favor de comunidades lencas en Río Blanco.

8. En la primera década de este siglo, el gobierno municipal de Intibucá comenzó a otorgar títulos de dominio pleno a favor de varios particulares no indígenas que ostentaban la posesión de tierras en Río Blanco. Según la información, se vendieron tierras sin la autorización de las asambleas comunitarias, que son las autoridades propias de las comunidades lencas. Según información recibida, parece que esas ventas ocurrieron, en varios casos, mediante coerción e intimidación de los habitantes indígenas. En la mayoría de los casos, las comunidades indígenas no tuvieron conocimiento sobre las ventas de tierras a favor de los particulares.

[8] BCIE, *Memoria anual de labores (2012)*, págs. 37, 63.

9. En 2011, empleados de DESA y el alcalde municipal de Intibucá realizaron reuniones de socialización en Río Blanco para informar sobre el proyecto y sus beneficios, como la construcción de carreteras y escuelas. La mayoría de los miembros de las comunidades de Río Blanco expresaron su rechazo al proyecto durante esas reuniones y en las más de 150 asambleas indígenas celebradas. Las comunidades se opusieron porque el proyecto afectaría sus tierras comunales, cultivos, fuentes de agua y hábitat funcional. Se denunciaron impactos a las tierras utilizadas por la comunidad de La Tejera para actividades de agricultura en las riberas del río Gualcarque. En la cosmovisión lenca, el río Gualcarque es sagrado por ser el hogar de seres espirituales femeninos. Por tanto, la concesión de las aguas del río para la represa también representaba un sacrilegio para la cultura lenca.

10. En 2012 y 2013, habitantes de Río Blanco denunciaron la presencia de empleados de DESA y SINOHYDRO en tierras comunales que habrían comenzado la construcción de la represa. Los empleados destruyeron cultivos tradicionales y también cercaron fuentes de agua comunitarias con el fin de abastecer de agua a la empresa. Asimismo, guardias de seguridad impedían a los comunitarios el acceso al río para la realización de actividades tradicionales de riego, pesca y uso doméstico.

11. Miembros de las comunidades de Río Blanco iniciaron actos de protesta, incluyendo la toma de la carretera construida por DESA que servía de acceso al sitio de construcción, con el apoyo del Consejo Cívico de Organizaciones Populares e Indígenas de Honduras (COPINH), una organización lenca fundada por Berta Cáceres. Como respuesta, se enviaron efectivos del ejército para custodiar permanentemente las instalaciones del proyecto y se produjeron varios intentos de desalojo de los manifestantes. En junio de 2013, durante una manifestación pacífica frente las instalaciones de la represa, un militar disparó contra el dirigente lenca Tomás García y su hijo, matando al Sr. García e hiriendo gravemente al hijo.

12. El proyecto generó divisiones en las comunidades de Río Blanco y afectó la convivencia social con comunidades aledañas. En septiembre de 2013 se había firmado un acuerdo entre el Gobierno, la empresa y comunidades de Río Blanco por el que, a cambio de su aceptación del proyecto, recibirían indemnizaciones y programas sociales por parte de la empresa. Sin embargo, según la información recibida, algunas de las personas que firmaron el acuerdo provenían de comunidades no indígenas de Santa Bárbara, y las personas que representaban a las comunidades de Río Blanco no estaban autorizadas por sus respectivas asambleas comunitarias. Por lo tanto, miembros de las comunidades de Río Blanco han mantenido su oposición al proyecto y han rechazado los acuerdos que supuestamente demostraban la aceptación del proyecto por parte de todas las comunidades indígenas de Río Blanco.

**Acciones legales y criminalización**

13. A raíz de la aprobación de los contratos para el proyecto Agua Zarca y otras represas que afectaban a pueblos indígenas, COPINH interpuso denuncias ante distintas autoridades nacionales, incluyendo la Fiscalía Especial de las Etnias del Ministerio Público, en las que alegaba la inobservancia del deber de consultar a los pueblos indígenas de acuerdo al Convenio número 169 de la OIT, ratificado por Honduras en 1994, incluida una denuncia penal en contra del entonces Secretario de Recursos Naturales y Medio Ambiente que había otorgado los permisos ambientales para dichos proyectos. Asimismo, se interpusieron denuncias ante el Ministerio Público en contra de la empresa DESA por usurpación de tierras y en contra del alcalde de Intibucá por permitir el proyecto en Río Blanco.

14. En 2015, se presentó un requerimiento fiscal por el delito de abuso de autoridad en contra del alcalde de Intibucá y se dictaminó un auto formal de procesamiento por el delito de abuso de autoridad en contra del ex Secretario de Recursos Naturales y Medio Ambiente

por su aprobación de la licencia ambiental para el proyecto sin consultar previamente a las comunidades indígenas. La información recibida por la Relatora Especial acerca de estas acciones legales impulsadas por la Fiscalía de Etnias confirma que el proyecto Agua Zarca fue aprobado antes de realizarse su socialización y de firmarse el acuerdo con las comunidades locales referido anteriormente, y que no se realizaron estudios de impacto social, ambiental y cultural antes de su aprobación. La Fiscalía de Etnias también impulsó acciones penales por el delito de homicidio y tentativa de homicidio en contra del miembro del ejército quien causó la muerte de Tomás García e hirió a su hijo. En diciembre de 2015, el militar fue condenado por homicidio, y queda pendiente la individualización de la pena.

15. Por otro lado, los miembros de COPINH fueron objeto de una serie de acusaciones judiciales y criminalización por sus actos de protesta. Berta Cáceres fue objeto de cargos penales por posesión ilegal de un arma de fuego supuestamente encontrada en su vehículo por la policía y también fue acusada, junto con los dirigentes de COPINH Tomás Gómez Membreño y Aureliano Molina, del delito de incitación a causar daños a la propiedad privada de DESA. En 2014, un tribunal dictó el sobreseimiento definitivo de los cargos de posesión ilegal de armas de fuego, lo que resultó en la revocación de las acciones penales contra la señora Cáceres. Ese mismo año, un tribunal de apelaciones afirmó el sobreseimiento provisional de los cargos contra Berta Cáceres, Tomás Gómez y Aureliano Molina por incitación y daños a la propiedad.

**La segunda fase del proyecto Agua Zarca**

16. Según la información, las protestas contra la represa en 2013 fueron uno de los factores causantes de la retirada de SYNOHYDRO. En diciembre de 2013, el CAMH decidió no proceder con su inversión en Agua Zarca, por lo que la CFI y el Banco Mundial dejaron de tener una participación activa en el proyecto. En octubre de 2015, DESA trasladó la construcción de la represa al otro lado del río Gualcarque, en San Francisco de Ojuera. Esta fase del proyecto contó con una financiación de 15 millones de dólares del Banco Holandés de Desarrollo (FMO) , 5 millones de dólares del Fondo Finlandés para la Cooperación Industrial (Finnfund) y 9 millones de dólares del Banco Centroamericano de Integración Económica (BCIE).

17. Según la información recibida, la empresa trasladó el proyecto porque la población de San Francisco de Ojuera no es indígena y el gobierno municipal habría autorizado el proyecto. Sin embargo, miembros de Río Blanco y de COPINH manifestaron que el traslado del proyecto no tomó en cuenta la presencia de indígenas lencas en Santa Bárbara y que tampoco se realizó un verdadero proceso de consulta previa con esas comunidades. Se ha señalado que el proyecto opera con la misma licencia ambiental cuya emisión es objeto de las acciones penales por parte de la Fiscalía de Etnias. De igual manera, consideran que las actividades en el nuevo sitio del proyecto aún afectan el derecho de las comunidades lencas en relación al río Gualcarque.

18. Tras el inicio de esta fase del proyecto, miembros de Río Blanco y de COPINH establecieron un campamento en frente de las instalaciones actuales del mismo como forma de protesta, lo que supuso de nuevo la presencia de unidades militares, policiales y guardias de seguridad para resguardar las instalaciones del proyecto.

## III. Hechos de violencia relacionados con el proyecto Agua Zarca

19. El proyecto Agua Zarca en sus dos fases ha generado una situación altamente conflictiva en la región de Río Blanco. Según la oficina de la Fiscalía de las Etnias, antes del año 2013, cuando avanzaron considerablemente las obras de construcción del proyecto, no se habían reportado incidentes serios de violencia y asesinatos en Río Blanco. Resulta

preocupante que la respuesta de la empresa y de las autoridades locales ante las protestas de las comunidades lencas haya sido la fuerte militarización de la zona. También preocupan los actos de violencia perpetrados por personas a favor del proyecto, con la tolerancia de las autoridades locales y policiales.

20. Miembros de las comunidades de Río Blanco y COPINH alegaron que desde las protestas de 2013 han sufrido actos de amenaza, intimidación, violencia y asesinatos, incluida la muerte de Tomás García, antes mencionada. Se había denunciado la presencia de personas encapuchadas contratadas por la fuerza de seguridad de la empresa que atemorizaban la población de Río Blanco mediante el disparo de armas en la noche y mediante su presencia alrededor de los hogares de los comunitarios y fuera del lugar donde se realizaba la toma de la carretera. Se alegó que, en noviembre de 2013, treinta policías vestidos con pasamontañas entraron a los hogares de dirigentes de Río Blanco para amenazarlos a ellos y a sus familiares y golpearon al hijo de uno de ellos.

21. En marzo de 2014, la coordinadora del Consejo Indígena de Río Blanco María Santos Domínguez, conocida por su oposición al proyecto, sobrevivió a un atentado contra su vida cuando siete individuos la atacaron con machetes, palos y piedras mientras caminaba hacia su casa, y lesionaron gravemente a su esposo e hijo de 12 años cuando estos trataban de auxiliarla. Según se alega, los agresores eran simpatizantes del proyecto y habían amenazado a la Sra. Domínguez y su familia en ocasiones anteriores.

22. Durante su visita de 2015, la Relatora Especial fue informada que además de Tomás García, otros tres indígenas de Río Blanco habrían muerto por su oposición al proyecto, entre ellos, los hermanos William y Maycol Rodríguez, asesinados en mayo y octubre de 2014 respectivamente en circunstancias que indicarían el involucramiento de personas afiliadas con la empresa o afines al proyecto. Los dos hermanos habían participado anteriormente en acciones de protesta en Río Blanco. Se ha denunciado que tras el asesinato de William Rodríguez, la policía entró por la fuerza a los hogares de dos miembros de COPINH en Río Blanco para capturarlos y amenazaron a otro dirigente indígena y a menores de edad presentes. Los dos miembros de COPINH, Lindolfo Benítez y Salvador Sánchez, habrían sido presuntamente torturados por la policía y posteriormente puestos en libertad.

23. A partir del inicio de la segunda fase del proyecto, se produjeron nuevos incidentes de amenazas y agresiones contra los manifestantes indígenas. Se denunciaron abusos cometidos por guardias de seguridad y militares incluyendo: amenazas de desalojo forzoso de los manifestantes instalados en frente del proyecto, lanzamiento de piedras de gran tamaño sobre el campamento de los manifestantes, disparo de ráfagas de armas de fuego desde las instalaciones de la empresa hacia el campamento durante horas de la madrugada y noche cerrada, y la toma de fotografías y grabaciones constantes de los manifestantes. Se reportaron también amenazas sexuales y agresiones físicas contra mujeres lencas que utilizaban el río Gualcarque cerca del proyecto por parte de guardias de seguridad y personas con pasamontañas.

24. Varios dirigentes lencas fueron objeto de amenazas y de disparos por parte de personas vinculadas con la empresa. En el caso de Berta Cáceres, se recibió información de que en los meses antes y después de la reanudación del proyecto, había vuelto a recibir numerosas amenazas. En enero y febrero de 2015, habría recibido continuas llamadas y mensajes de texto anónimos advirtiéndole sobre el riesgo de sufrir secuestro o desaparición por su labor en Río Blanco. En marzo de 2015, el presidente del Consejo Indígena de Río Blanco habría informado a la Sra. Cáceres de que una de las familias poderosas de la región vinculada con DESA tenía un plan para acabar con su vida. En noviembre de 2015, el dirigente de COPINH Tomás Gómez habría recibido una llamada de un miembro de esa misma familia manifestándole que él y Berta Cáceres eran los responsables de agitar a la

gente de Río Blanco por lo que ellos mismos serían los responsables de "cualquier cosa que les pase" y que debían atenerse a las consecuencias.

25. El 30 de noviembre de 2015, cuando la Sra. Cáceres y otros integrantes de COPINH se dirigían en dos autobuses hacia San Francisco de Ojuera para realizar una manifestación pacífica y reunirse con el alcalde local, fueron detenidos y registrados por la policía. Al llegar a su destino, fueron interceptados por varios trabajadores municipales armados con machetes y armas cortas que empezaron a lanzarles piedras y, en referencia a la Sra. Cáceres, dijeron que "esta es la vieja puta que hay que matar". Uno de los hombres armados estuvo cerca de apuñalar en el tórax a la Sra. Cáceres. Estos hechos se dieron ante la presencia de agentes policiales y militares.

26. En febrero de 2016, la Sra. Cáceres fue amenazada y hostigada por un agente de policía durante un desalojo forzoso de 50 familias afiliadas al COPINH efectuado por policías y militares en Jarcia, Guinse, Intibucá. El agente le indicó que las fuerzas de seguridad no respondían por ella si le sucedía algo. En la mañana del 2 de marzo de 2016, horas antes del asesinato de Berta Cáceres, el jefe de seguridad de DESA junto con otras personas fueron vistos en un vehículo en Siguatepeque, donde se refirieron a ella con insultos, para dirigirse después hacia La Esperanza, donde vivía la Sra. Cáceres[7]. En la madrugada del 3 de marzo de 2016, Berta Cáceres fue asesinada por personas armadas que entraron a su hogar y le dispararon causándole la muerte.

27. De acuerdo con información recibida, tras el asesinato de Berta Cáceres, miembros de COPINH y Río Blanco continuaron siendo víctimas de amenazas, hostigamientos y agresiones por parte de personas afines al proyecto y miembros de la seguridad privada de DESA. En abril de 2016, durante un encuentro internacional en honor a Berta Cáceres, integrantes de COPINH y de organizaciones nacionales e internacionales que acababan de participar en una ceremonia cultural a orillas del río Gualcarque y se dirigían hacia sus vehículos en San Francisco de Ojuera fueron emboscados por un grupo de empleados y personas afines al proyecto en evidente estado de ebriedad que les golpearon con palos y piedras. Diez personas resultaron heridas entre ellas niños y personas extranjeras. Según la información, los agresores mencionaron haber matado a la Sra. Cáceres y en referencia al actual coordinador de COPINH, Tomás Gómez, habrían gritado "ataquémoslo, él es el que ha quedado". Asimismo, habrían amenazado a otros dirigentes de COPINH. Todos estos hechos ocurrieron con la tolerancia de efectivos policiales y militares que estuvieron presentes. Se informó de que entre los agresores se encontraba un sicario con antecedentes criminales por homicidio y que anteriormente había amenazado de muerte a la Sra. Cáceres y a otros miembros de COPINH.[8]

28. Doce días después de la muerte de Berta Cáceres, fue asesinado otro dirigente de COPINH. El 15 de marzo de 2016, Nelson Noé García fue asesinado por dos personas desconocidas luego de haber participado en acciones de apoyo a favor de la comunidad lenca de Río Chiquito, departamento de Cortés, que ese día había sido desalojada forzosamente por efectivos de la fuerza pública. Este hecho es particularmente preocupante debido a que, tras el asesinato de Berta Cáceres, los miembros de COPINH, junto con los familiares de la Sra. Cáceres y el único testigo del crimen, Gustavo Castro, son beneficiarios de medidas cautelares otorgadas por la Comisión Interamericana de Derechos Humanos (CIDH) que ordenan al Estado hondureño garantizar su vida e integridad personal. En el caso de COPINH, las medidas cautelares fueron otorgadas debido al grave riesgo que corren sus miembros por su labor de defensa de los derechos del pueblo lenca

[7] Informe de la Misión Internacional "Justicia para Berta Cáceres Flores", (marzo de 2016), Anexo 2.

[8] Estos hechos han sido objeto de una comunicación conjunta de los procedimientos especiales con fecha de 27/05/2016

particularmente en relación con Agua Zarca". Tras el asesinato de Nelson García, EMO y Finnfund decidieron suspender sus actividades relacionadas con Agua Zarca, señalando específicamente la situación de violencia en el país.

## IV. Las investigaciones sobre el asesinato de Berta Cáceres

29. Como se señala en el informe de la misión, la falta de acceso a la justicia y los altos niveles de impunidad constituyen graves problemas que aquejan a los pueblos indígenas de Honduras. Debido a las amenazas y agresiones contra la Sra. Cáceres en los últimos meses antes de su muerte, se sospecharía que ésta estuvo relacionada con sus acciones de protesta contra Agua Zarca. La situación de impunidad en el país y la desconfianza hacia el sistema nacional de justicia motivaron los llamados a nivel nacional e internacional para que se conformara una comisión internacional de expertos independientes para supervisar las investigaciones realizadas por las autoridades nacionales.

30. En el caso de Berta Cáceres surgieron varios factores que generaron desconfianza y temores de que el crimen permaneciera impune. Se denunciaron irregularidades en la investigación, como la falta de control del escenario del crimen por parte de las autoridades policiales presentes en el hogar de la Sra. Cáceres después de su asesinato, lo que pudo haber resultado en su contaminación. Inicialmente, las hipótesis de las autoridades se centraron en supuestos conflictos internos entre miembros de COPINH o en un crimen pasional. Por ello, en un primer momento interrogaron principalmente a otros miembros de COPINH, lo que generó la preocupación de que fueran considerados como sospechosos y posibles imputados[3]. De igual manera, el único testigo del crimen, Gustavo Castro, de nacionalidad mexicana, fue objeto de una orden judicial de retención para prohibir su salida del país. Según la información, la juez que emitió la orden de retención admitió que no existía fundamento legal para prohibir su salida del país y que desde México podría colaborar con la investigación. La prohibición de salir del país por varias semanas puso en grave riesgo la vida del Sr. Castro, puesto que los responsables del asesinato de la Sra. Cáceres continuaban impunes.

31. En abril de 2016, el Ministerio Público informó que había sido procesado penalmente el presunto responsable del asesinato de Nelson Noé García y que, en el caso de Berta Cáceres, se habían decomisado armas y documentos y se había tomado declaración a los empleados de DESA. También informó que había ordenado el cese de la medida impuesta a Gustavo Castro, lo cual le permitió salir del país[4]. El 2 de mayo de 2016, el Ministerio Público anunció que, mediante un operativo conjunto de la Fiscalía Especial de Delitos Contra la Vida, la Agencia Técnica de Investigación Criminal y la policía militar, habían capturados cuatro individuos, que han sido acusados del crimen. Los cuatro acusados incluyen un técnico ambiental de DESA, el subjefe de seguridad de la empresa, un militar en activo y un militar retirado. La Sra. Cáceres habría denunciado al técnico y al oficial de seguridad por amenazas reiteradas. El 6 de mayo, se anunció que una quinta persona había sido acusada por participar en el delito.

32. Por otro lado, los familiares de Berta Cáceres denunciaron que no han podido tener acceso al expediente de investigación ni han podido intervenir como sujetos activos de la misma. Con respecto a la captura de los cinco acusados, han afirmado que si bien es un avance importante, se debe proceder a investigar a los autores intelectuales del crimen, lo

[3] *Ver* CIDH, Medida Cautelar No. 112-16, *Asunto miembros de COPINH y familiares de Berta Cáceres respecto de Honduras* (5 de marzo de 2016).

[4] Informe de la Misión Internacional "Justicia para Berta Cáceres Flores", (marzo de 2016), sec. 4.2.

[4] Comunicado del Ministerio Público, (1 de abril de 2016).

que pudiera incluir a representantes de la empresa y agentes estatales adicionales. En este sentido, han remarcado la importancia de que el Gobierno acepte la participación de la comisión internacional de expertos independientes antes mencionada.

## V. Las declaraciones de la empresa y de los inversionistas

33. La Relatora Especial ha recibido información publicada por la empresa DESA que sostiene que el proyecto Agua Zarca ha cumplido con la legislación nacional en materia de desarrollo energético, que las tierras en donde se desarrollaría el proyecto fueron vendidas por propietarios privados o son tierras municipales, y que el proyecto cumplirá con altos estándares ambientales. Asimismo, se afirma que el consentimiento a favor del proyecto se obtuvo mediante el acuerdo firmado en 2013 entre el Gobierno, la empresa y representantes de comunidades locales, por lo que solo la comunidad de La Tejera, incitada por COPINH, se opone al proyecto. En declaraciones públicas enviadas a organizaciones nacionales e internacionales de derechos humanos en los últimos meses, la empresa ha acusado a COPINH de actos vandálicos y de manipular la percepción pública en torno al proyecto.

34. La Relatora Especial considera que si bien podrían existir opiniones divergentes entre las comunidades locales sobre el proyecto Agua Zarca, es muy preocupante el nivel de violencia, asesinatos, amenazas e intimidación que se ha dado en contra de los opositores al proyecto. Asimismo, observa que las declaraciones públicas de la empresa han tenido la clara intención de deslegitimar la labor de COPINH en apoyo a las comunidades de Río Blanco.

35. La Relatora Especial pudo constatar la situación de alta conflictividad social durante su visita a Río Blanco. En dos ocasiones, antes y después de visitar el sitio del proyecto, un grupo de alrededor de 20 personas compuesto por empleados de la empresa y pobladores de otras comunidades que favorecían el proyecto impidieron el paso de la delegación de la Relatora Especial. En medio del clima de tensión causado por esta acción, miembros de la delegación de la Relatora Especial mediaron para que les permitieran continuar en ambas ocasiones. El grupo acusaba a Berta Cáceres y a COPINH de instigar la violencia y el conflicto en la región. Miembros de COPINH y de Río Blanco informaron que la noche anterior, cuando estaban ayudando en los preparativos de la visita de la Relatora Especial, habrían sufrido amenazas y agresiones por parte de hombres armados quienes detonaban armas y lanzaban piedras.

36. Tras el asesinato de Berta Cáceres, los inversionistas del proyecto Agua Zarca emitieron declaraciones repudiando el crimen y publicaron información sobre el desarrollo del proyecto. El banco FMO manifestó que realizaría una visita de alto nivel a Honduras junto con consultores independientes y representantes de las otras instituciones financieras para realizar una investigación exhaustiva de la situación incluyendo entrevistas con las comunidades locales.

37. La información publicada por FMO hasta el momento asevera que la naturaleza y los impactos previstos del proyecto cambiaron considerablemente desde su traslado al otro lado del río Gualcarque[27]. Según lo informado, el proyecto ya no será una represa que requiere almacenar agua sino que se utilizará un sistema de "tipo fluyente sin reservorio" que desviaría el agua corriente del río directamente hacia la sala de generación. Este tipo de proyecto, según informa, no supondría desplazamientos de comunidades ni afectaciones a sus recursos forestales o producción agrícola, y su acceso al río solo se vería restringido

[27] FMO, "Preguntas frecuentes sobre el proyecto hidroeléctrico Agua Zarca". Disponible en https://www.fmo.nl/l/en/news-view/2726/3/2016/0/questions-and-answers-agua-zarca-hydroelectric-project.

temporalmente. Se afirma que el proyecto abarcaría un total de 35 hectáreas de tierras adquiridas mediante acuerdo con propietarios privados. Ello incluye 1,09 hectáreas adquiridas de la comunidad indígena de Valle de Angeles y el resto se encuentra en poblados no indígenas. Con respecto al río Gualcarque, se afirma que solo la comunidad de La Tejera lo considera sagrado y no las demás comunidades locales.

38. EMO señala también que se obtuvo el consentimiento de todas las comunidades afectadas mediante acuerdos firmados en 2013 y en 2014 con las comunidades del otro lado del río. A la vez, sostiene que el consentimiento libre, previo e informado no es un requisito, puesto que el actual proyecto no desplazará comunidades indígenas ni afectará tierras comunales. En este sentido, la Relatora Especial quiere subrayar las alegaciones recibidas sobre el rechazo expresado por las comunidades de Río Blanco durante varias reuniones de socialización del proyecto en 2013 y las alegaciones sobre la falsificación de firmas de comunitarios lencas que fueron utilizados en supuestos acuerdos a favor de la represa.

39. EMO también informó que ha realizado estudios de debida diligencia que consideraron los impactos sobre grupos vulnerables y ha brindado "capacitaciones para el proyecto Agua Zarca sobre seguridad y mecanismos de coordinación con todos los proveedores de seguridad correspondientes." Según explica EMO, antes de suscribir el acuerdo con DESA "realizó viajes de debida diligencia con el objetivo de entender mejor los impactos sociales y ambientales del proyecto, y ayudar al cliente a planificar medidas de mitigación. Asimismo, ha realizado viajes anuales de monitoreo y ha confiado en las visitas frecuentes de los consultores independientes en materia de medioambiente y seguridad." Agrega además, que sus "estudios de debida diligencia ambiental, social y de gobernanza" se han sometido a un proceso de revisión interna cuyos resultados son publicados en internet, y también cuenta con un mecanismo de denuncias independiente.

40. La Relatora Especial advierte que si bien los estudios referidos constituirían importantes herramientas, estos parecen haberse realizado en una etapa posterior a la decisión de las autoridades locales y nacionales de permitir el proyecto sin haber observado los estándares internacionales sobre pueblos indígenas, consulta y consentimiento. Debe también señalarse que tales medidas parecen no haber tenido el objeto de investigar, prevenir o sancionar la serie de amenazas, hostigamientos y asesinatos de dirigentes indígenas a lo largo de los años desde que inició el proyecto.

## VI. Las responsabilidades del Estado, las empresas y los inversionistas

41. La Relatora Especial considera necesario resaltar las responsabilidades en materia de derechos humanos del Estado, las empresas y los inversionistas en relación con la aprobación y ejecución del proyecto Agua Zarca.

42. Como menciona el informe de país, Honduras ha ratificado los principales instrumentos universales y regionales de derechos humanos, y ratificó el Convenio 169 de la OIT sobre pueblos indígenas y tribales ("Convenio 169") en 1994. Honduras votó a favor de la Declaración de la ONU sobre los derechos de los pueblos indígenas ("Declaración"), que constituye la expresión más autorizada del consenso internacional existente en relación con los derechos individuales y colectivos de los pueblos indígenas[1]. Cabe agregar las responsabilidades del Estado respecto a las actividades de empresas privadas. Ello incluye

[1] Ibid.
A/HRC/9/9, párrs. 43-44.

la obligación de brindar protección contra las violaciones de los derechos humanos cometidas por las empresas mediante "medidas apropiadas para prevenir, investigar, castigar y reparar esos abusos mediante políticas adecuadas, actividades de reglamentación y sometimiento a la justicia."[3]

43. Las empresas y las instituciones financieras también deben respetar los derechos humanos. Según los Principios Rectores de las Naciones Unidas sobre las empresas y los derechos humanos, que también deben ser referentes para instituciones financieras, la responsabilidad de respetar los derechos humanos "[e]xiste con independencia de la capacidad y/o voluntad de los Estados de cumplir sus propias obligaciones de derechos humanos y [constituye] una responsabilidad adicional a la de cumplir las leyes y normas nacionales de protección de los derechos humanos."[4] Para tal fin, las empresas deben ejercer la debida diligencia en materia de derechos humanos, lo que incluye una evaluación del impacto real y potencial de sus actividades sobre los derechos humanos que abarca "las consecuencias negativas sobre los derechos humanos que la empresa haya provocado o contribuido a provocar a través de sus propias actividades, o que guarden relación directa con sus operaciones, productos o servicios prestados por sus relaciones comerciales."[5]

**Consulta y consentimiento**

44. Como se ha expuesto anteriormente, el contrato a favor de DESA para desarrollar el proyecto, así como los contratos a favor de otros proyectos hidroeléctricos que afectarían a pueblos indígenas, fue aprobado mediante un acto legislativo que no fue consultado con los pueblos indígenas afectados. Las acciones penales contra el alcalde de Intibucá y el Secretario de Recursos Naturales y Medio Ambiente advierten que las decisiones de estas autoridades en relación con su respectiva aprobación del proyecto violentaron las obligaciones de consultar a los pueblos indígenas afectados. Por otra parte, aunque la empresa e inversionistas mencionan acuerdos firmados que expresan el consentimiento de las comunidades locales, incluyendo de comunidades lencas, debe resaltarse que dichos acuerdos han sido fuertemente cuestionados y que fueron suscritos después de la aprobación formal del proyecto por parte del Estado mediante el acto legislativo mencionado. Ello significa que el compromiso entre la empresa y el Gobierno ya existía independientemente de esos acuerdos.

45. Lo anterior señala falencias en el cumplimiento de los principios y objetivos de la consulta previa. Con respecto a medidas legislativas o administrativas que afecten a los pueblos indígenas, la Declaración dispone que se debe consultar a los pueblos indígenas por medio de sus instituciones representativas antes de adoptar y aplicar estas medidas a fin de obtener su consentimiento, libre, previo e informado (artículo 19). Ello incluye medidas administrativas o legislativas de aplicación general si estas afectan a los pueblos indígenas de manera diferenciada dada sus condiciones y derechos particulares[6].

46. En sentencias recientes sobre el pueblo garífuna de Honduras, la Corte Interamericana de Derechos Humanos reafirmó su jurisprudencia, que establece claramente que el derecho a la consulta es una norma convencional y un principio general del derecho internacional que "implica el deber del Estado de organizar adecuadamente todo el aparato gubernamental y de estructurar sus normas e instituciones de tal forma que la consulta [a

[3] Principios Rectores sobre las empresas y los derechos humanos ["Principios Rectores"], HR/PUB/11/04, Principio 1.
[4] Ibid., Principio 11 (Comentario).
[5] Ibid., Principio 17.
[6] A/HRC/12/34, par. 43.

los pueblos indígenas] pueda llevarse a cabo efectivamente, de conformidad con los estándares internacionales ...".[5]

47. La Corte precisó que "el Estado debe garantizar el derecho de consulta y participación en todas las fases de planeación e implementación de un proyecto o medida que pueda afectar el territorio de [un pueblo indígena], u otros derechos esenciales para su supervivencia como pueblo. Lo anterior debe realizarse desde las primeras etapas de la elaboración o planificación del proyecto o la medida propuesta, a fin de que los pueblos indígenas puedan verdaderamente participar e influir en el proceso de adopción de decisiones, de conformidad con los estándares internacionales pertinentes. En esta línea, el Estado debe asegurar que los derechos de los pueblos indígenas... no sean obviados en cualquier otra actividad o acuerdo que haga con terceros, o en el marco de decisiones del poder público que afectarían sus derechos e intereses."[6].

48. Tal como ha sentenciado la Corte Interamericana y subrayado el anterior Relator Especial, la consulta y el consentimiento representan salvaguardias de derechos sustantivos de los pueblos indígenas, entre ellos, "los derechos a la participación y libre determinación, los derechos a la cultura, a la religión y a no ser objeto de discriminación en relación con las tierras, los territorios y los recursos naturales, lo cual incluye los lugares y objetos sagrados".[7] Como regla general, el consentimiento libre, previo e informado es obligatorio cuando haya un impacto significativo sobre estos derechos fundamentales. Por tanto, el deber de obtener el consentimiento aplica no sólo en los casos en que haya desplazamiento, como resaltaron los inversionistas (ver párr. XX), sino en todos los casos en que hubiese efectos significativos sobre los derechos sustantivos de los pueblos indígenas, que en el caso de Río Blanco incluirían los derechos sobre tierras ancestrales, cultura y sitios sagrados.

**Los estudios de impacto**

49. Otra importante salvaguardia que complementa la consulta previa es, como establece el artículo 7.3 del Convenio 169, la realización de estudios, en cooperación con los pueblos indígenas "a fin de evaluar la incidencia social, espiritual y cultural y sobre el medio ambiente que las actividades de desarrollo previstas puedan tener sobre esos pueblos [y cuyos resultados] deberán ser considerados como criterios fundamentales para la ejecución de las actividades mencionadas." Estos estudios, según la Corte Interamericana, sirven para asegurar que los pueblos indígenas "tengan conocimiento de los posibles riesgos, incluidos los riesgos ambientales y de salubridad" para que puedan opinar sobre el proyecto en cuestión dentro de un proceso de consulta "con conocimiento y de forma voluntaria".[8] Los estudios deben "realizarse conforme a los estándares internacionales y buenas prácticas al respecto, respetar las tradiciones y cultura de los pueblos indígenas y tribales y ser concluidos de manera previa al otorgamiento de la concesión o licencia, ya que uno de los objetivos de la exigencia de dichos estudios es que el Estado garantice el derecho de la Comunidad a ser informado acerca de todos los proyectos propuestos en su territorio y a su participación efectiva en el proceso de otorgamiento de concesiones o licencias."[9].

50. En el caso de Agua Zarca, no existen indicios de que se hayan realizado estudios de impacto social, cultural y ambiental de manera previa a la aprobación del proyecto mediante los cuales las comunidades indígenas hubieran podido tomar una decisión

[5] *Ver*, Corte IDH, *Caso Comunidad Garífuna Triunfo de la Cruz vs. Honduras*, (Sentencia de 8 de octubre de 2015), ["Caso Triunfo de la Cruz"], párr. 159.
[6] Ibid., párr. 160.
[7] A/HRC/24/41, párr. 28.
[8] Caso Triunfo de la Cruz, párr. 180.
[9] Ibid., párr. 180.

informada sobre su aprobación. Cualquier falencia en el desarrollo de procesos de consulta y de estos estudios de impacto deben ser investigados como parte de la debida diligencia que deben ejercer las empresas e instituciones financieras a fin de evaluar las consecuencias negativas reales o potenciales de sus actividades o relaciones comerciales. Como pasos fundamentales en ese sentido, se deben "evaluar el contexto derechos humanos antes de emprender una actividad empresarial propuesta [...]; identificar a los posibles afectados, catalogar las normas y cuestiones pertinentes de derechos humanos, y proyectar las consecuencias de la actividad propuesta y de las relaciones comerciales correspondientes sobre los derechos humanos de las personas identificadas. En este proceso, las empresas deben prestar especial atención a las consecuencias concretas sobre los derechos humanos de [grupos vulnerables, como los pueblos indígenas]."[1]

51. Como parte de un verdadero proceso de debida diligencia, las empresas e instituciones financieras deben en primer lugar determinar si existen pueblos indígenas en o cerca de los lugares donde se piensa realizar una actividad, y luego debe haber una investigación sobre los derechos a tierras, recursos naturales y consulta previa que pudiera corresponder a los pueblos indígenas bajo estándares internacionales. Dicha investigación no puede limitarse a los derechos de tenencia de tierra que sean reconocidos oficialmente por el Estado, ya que el deber de consulta existe no sólo en los casos en que una medida o actividad afectara tierras reconocidas como tierras indígenas sino siempre cuando estén en juego sus intereses particulares aunque no corresponda a un derecho a la tierra reconocido.[2] Al respecto cabe señalar que la jurisprudencia de la Corte Interamericana afirma la obligación de los Estados de reconocer que la posesión tradicional de sus tierras tiene efectos equivalentes a títulos de pleno dominio otorgados por el Estado y el correlativo derecho de los pueblos indígenas de exigir su reconocimiento legal, y el derecho de recuperación de tierras que hayan sido perdidas involuntariamente y trasladadas a terceros.[3]

**Tenencia de la tierra**

52. La Relatora Especial observa que existen divergencias entre las alegaciones recibidas y las declaraciones de la empresa e inversionistas en relación con la tenencia de la tierra utilizada para el proyecto. Con respecto a la primera fase de Agua Zarca, se alegó que las tierras ancestrales de comunidades lencas fueron objeto de ventas no autorizadas a particulares que luego fueron adquiridas por la empresa. En relación con la segunda fase del proyecto, supuestamente en una región no indígena, no obstante se han alegado afectaciones a tierras y recursos naturales ancestrales, además de los impactos continuos sobre el sagrado río Gualcarque.

53. La situación de la tenencia de la tierra afectada por el proyecto, los derechos que pudieran corresponder a las comunidades lencas de Río Blanco con base a su uso y posesión ancestral conforme a los estándares internacionales, y los eventuales impactos al río Gualcarque, entre otros asuntos, son cuestiones que debieron haber sido resueltas por el Gobierno antes de firmar contratos y otorgar las licencias para el proyecto. La empresa y las instituciones financieras debieron haber asegurado el cumplimiento de estas obligaciones internacionales como parte de su debida diligencia, y no haber tomado acciones que pudieran generar desconfianza y perjudicar los derechos de los pueblos indígenas. Estas constituyen medidas que el Gobierno, la empresa e instituciones financieras pudieran haber adoptado para asegurar una buena relación con todas las comunidades indígenas afectadas; y mediante procesos de consulta y de estudios de impactos sociales, culturales y ambientales adecuados, definir posibles medidas de

[1] Principios Rectores, Principio 18 (Comentario).
[2] A/HRC/12/34, parr. 41.
[3] Caso Triunfo de la Cruz, parr. 105.

mitigación, indemnización y beneficios que respeten sus derechos y prioridades de desarrollo. Sin embargo, en el caso de Agua Zarca se han dado serias violaciones a los derechos humanos debido a los actos de violencia, intimidación, hostigamiento y asesinatos contra indígenas opuestos al proyecto que difícilmente justifican la continuación del proyecto aun si fuera posible subsanar los problemas relacionados con la falta de consulta previa y de estudios de impacto adecuados.

**Responsabilidades respecto a la violencia relacionada con el proyecto Agua Zarca**

54. Los actos de violencia asociados con la realización del proyecto incluyendo los asesinatos de Berta Cáceres, Tomás García y otros dirigentes lencas, constituyen también delitos, y al respecto, el Estado, la empresa e instituciones financieras tienen responsabilidades bajo los estándares internacionales.

55. Los Estados tienen la obligación de adoptar medidas adicionales de protección contra las violaciones de derechos humanos cometidas por empresas bajo su control "o que reciban importantes apoyos y servicios de organismos estatales."[5] Estos servicios podrían incluir los que provienen de organismos oficiales de crédito, de seguros y garantías de inversiones, instituciones financieras de desarrollo, y además, en el caso de Agua Zarca deben resaltarse los servicios de seguridad brindados por agentes policiales y militares a la empresa DESA. El hecho de que agentes militares hayan sido implicados en los asesinatos del Sr. García y de la Sra. Cáceres demuestra la responsabilidad estatal por estas violaciones y, por tanto, su obligación de garantizar justicia y reparación. Cabe señalar además que el Estado tenía la responsabilidad de brindar medidas eficaces de protección para Berta Cáceres porque en 2009 fue beneficiaria de medidas cautelares de la CIDH debido a la situación de riesgo que enfrentaba por su labor de defensa de los derechos de los pueblos indígenas.

56. El Estado tiene la obligación de garantizar el acceso a la justicia para personas afectadas por abusos cometidos por la empresa y agentes estatales mediante vías judiciales, administrativas o legislativas que incluyan sanciones punitivas penales o administrativas, así como medidas de restitución o compensaciones económicas y no económicas, entre otras. El Estado debe asegurar que no existan obstáculos en los mecanismos judiciales que impidan el acceso a la justicia, y "asegurar que la corrupción judicial no obstruya la administración de justicia, que los tribunales sean independientes de presiones económicas o políticas de otros agentes del Estado y de actores empresariales, y que no se pongan obstáculos a las actividades legítimas y pacíficas de los defensores de los derechos humanos."[6]

57. En el caso de las empresas, si éstas han provocado o contribuido a provocar violaciones de derechos humanos, deben repararlas, y en el caso de la comisión de un delito, "es preciso cooperar con los mecanismos judiciales."[7] Como se ha expuesto en la sección XX, personas vinculadas con la empresa DESA, incluyendo personal de seguridad, habrían estado implicadas en actos de de amenaza, hostigamiento, y violencia, además del hecho de que dos personas vinculadas a la empresa han sido imputadas por el asesinato de Berta Cáceres. Por lo tanto, DESA debe colaborar en el esclarecimiento de todos los posibles autores materiales e intelectuales del crimen que pudieran estar vinculados con la empresa.

58. Por otro lado, los bancos inversionistas en este caso deben ser conscientes de sus responsabilidades al haber tenido relaciones comerciales con una empresa implicada en

[5] Principios Rectores., Principio 4.
[6] Ibid., Principios 25, 26, y Comentario.
[7] Ibid., Principio 22 y Comentario.

actos que constituyen delitos y graves violaciones de derechos humanos. Aun antes del asesinato de Berta Cáceres se habían producido graves violaciones de los derechos humanos, incluyendo amenazas, actos de agresión y muertes cometidas por agentes militares, personas vinculadas con la empresa o simpatizantes del proyecto. Es preocupante que, no obstante esta situación, los bancos inversionistas nunca vieran motivo para cuestionar el apoyo que brindaban al proyecto, pese a que, según el FMO (párr. XX), se habían realizado de manera continua estudios y viajes de debida diligencia y se contrataron consultores para averiguar los impactos del proyecto.

59. Lo anterior hace surgir la pregunta, ¿qué valor se le dio a la serie de denuncias sobre los actos de violencia a través de los años contra miembros de COPINH y comunitarios de Río Blanco opuestos al proyecto? Otra cuestión que debió haber sido abordada es la serie de acciones penales contra funcionarios que aprobaron el proyecto. La Relatora Especial advierte que las declaraciones de DESA y de las instituciones financieras nunca hicieron referencia a estas acciones penales, a los diversos actos de violencia que han sufrido los opositores al proyecto desde su inicio, o a las medidas adoptadas para asegurar que tales actos no se repitan y sean sancionados. Considera que estos son temas que deberían haber sido abordados en cualquier estudio de debida diligencia realizado tanto por las empresas como por las instituciones financieras en relación con este tipo de proyectos.

60. Al haber realizado capacitaciones a la empresa sobre seguridad y medidas de mitigación (párr. XX), FMO ha ejercido una influencia sobre DESA que debería haber prevenido violaciones de derechos humanos. En sus relaciones comerciales con otras entidades, las empresas e instituciones financieras deben ejercer su influencia para mitigar las consecuencias negativas ocasionadas por las otras entidades, especialmente si tienen la capacidad de "modificar las prácticas perjudiciales de una entidad que provoque un daño". Por otro lado, si una empresa o institución carece de influencia para prevenir o mitigar las consecuencias negativas de la otra entidad, debe considerar poner fin a la relación, teniendo en cuenta "la gravedad de las consecuencias sobre los derechos humanos, cuanto más grave sea la violación, menos debería tardar la [institución] en decidir si rompe la relación. En cualquier caso, mientras prosiga la violación en cuestión y la [institución] mantenga su relación comercial, debe estar en condiciones de demostrar sus propios esfuerzos por mitigar el impacto y aceptar las consecuencias —en términos de reputación, financieras o legales— de prolongar su relación."[77]

61. Dada la gravedad de las violaciones de derechos humanos y los delitos vinculados con el proyecto, cabría preguntarse sobre la responsabilidad compartida de FMO, Finnfund y BCIE por estos actos. Según los Principios Rectores, "Pueden plantearse cuestiones de complicidad cuando una [institución financiera] contribuye o parece contribuir a las consecuencias negativas sobre los derechos humanos causadas por otras partes [...] La jurisprudencia de derecho penal internacional indica que el criterio pertinente para definir la complicidad es la asistencia práctica prestada a sabiendas en la comisión de un delito o la incitación con efectos relevantes sobre la comisión del mismo."[78] El simple hecho de estar asociada con una empresa implicada en acciones delictivas y de violaciones de derechos humanos, aun sin reunir los requisitos técnicos de complicidad penal, debe considerarse como una condición inaceptable para cualquier empresa o institución financiera, que pone entredicho su reputación y credibilidad en la toma de decisiones.

62. Cabe señalar que todas las instituciones financieras han suspendido su financiamiento del proyecto semanas después del asesinato de Berta Cáceres, y que tras la captura de personas vinculadas con la empresa, FMO y Finnfund han declarado su

[77] Ibid., Principio 22 y Comentario.
[78] Ibid., Principio 22 y Comentario.

intención de retirarse del proyecto si se probara la vinculación de la empresa con el asesinato[56].

## VII. Consideraciones finales y recomendaciones

63. La Relatora Especial observa con preocupación que se han presentado varias justificaciones para dar prioridad a proyectos hidroeléctricos y otros similares por encima de cualquier consideración sobre los impactos negativos que pudieran tener sobre las vidas, culturas, tierras y modos de vida tradicional de los pueblos indígenas. En declaraciones anteriores, el FMO sostuvo que si decidiera retirar su financiamiento del proyecto Agua Zarca, esto no detendría el proyecto y que privaría a las comunidades locales que apoyan el proyecto de empleos y energía limpia.[57] Asimismo, durante un seminario donde se le preguntó sobre los impactos de las represas y el asesinato de Berta Cáceres, el presidente del Banco Mundial respondió que "no se puede hacer el tipo de trabajo que estamos tratando de hacer y no tener algunos de estos incidentes".[58] Agregó que dado que la gente necesita energía de fuentes renovables, los proyectos hidroeléctricos en países como Honduras se llevarán a cabo de todos modos. Aseveró que pese a las críticas y discusiones que puedan darse en torno a los derechos de propiedad de comunidades afectadas, sin esos proyectos, se violarían los derechos de las mismas comunidades al empleo y a fuentes de energía.

64. La Relatora Especial considera que se debe cuestionar la premisa de que el desarrollo y el acceso a energía eléctrica justifican graves violaciones a los derechos a la vida e integridad personal y a los derechos de los pueblos indígenas como las que se han producido en Río Blanco. Cabe reiterar que ninguna de las comunidades indígenas locales, incluso las que supuestamente han estado a favor del proyecto, tuvo poder de incidencia en las decisiones del Estado antes de la aprobación del contrato a favor de DESA y el proyecto Agua Zarca. Este tipo de exclusión y de falta de participación de los pueblos indígenas ha llevado a serios conflictos en todo el mundo. Como ha señalado el anterior Relator Especial, "sin la adhesión de los pueblos indígenas, conseguida mediante consultas en las primeras etapas de la elaboración de las iniciativas gubernamentales, la eficacia de los programas gubernamentales, incluso los que se proponen beneficiar específicamente a los pueblos indígenas, puede verse menoscabada desde el comienzo. Al parecer la falta de una consulta apropiada lleva a siempre a situaciones conflictivas en que los indígenas manifiestan su cólera y su desconfianza y que, en algunos casos, han degenerado en actos de violencia."[59]

65. La Relatora Especial considera que si bien la promoción de fuentes renovables de energía es un importante objetivo, dados los impactos del cambio climático, particularmente en países como Honduras, los pueblos indígenas no deben ser excluidos de los procesos de planificación del desarrollo y la política energética nacional, puesto que muchos de esos proyectos afectarían territorios ancestrales indígenas. Los procesos de licitación pública, de distribución de licencias y otros procesos empleados en la planificación estatal para proyectos de desarrollo de recursos naturales deben tomar en cuenta el deber de consultar previamente a los pueblos indígenas afectados, de lo contrario se convierten en "desencadenantes de decisiones que perjudican a la capacidad de los pueblos indígenas para establecer sus propias prioridades de desarrollo de sus tierras y

[56] *FMO busca salir de Agua Zarca*, 9 de mayo de 2016.

[57] FMO, *Response FMO on advertisement in De Volkskrant*, 21 de abril de 2016.

[58] *The Principle of Mercy: World Bank President Jim Yong Kim*. Disponible en https://www.youtube.com/watch?v=1IWZ102R4LA.

[59] A/HRC/12/34, parr. 36.

territorios."[8] Cabe recordar que el Convenio 169 establece el derecho de los pueblos indígenas de "decidir sus propias prioridades en lo que atañe al proceso de desarrollo, en la medida en que éste afecta a sus vidas, creencias, instituciones y bienestar espiritual y a las tierras que ocupan o utilizan de alguna manera ... [y además] deberán participar en la formulación, aplicación y evaluación de los planes y programas de desarrollo nacional y regional susceptibles de afectarles directamente" (artículo 7.1).

66. Los pueblos indígenas tienen mucho que aportar en la planificación del desarrollo local y nacional gracias a sus conocimientos milenarios y especial relación con sus tierras ancestrales. Mediante procesos verdaderos de consulta y participación, los pueblos indígenas deben tener un espacio para contribuir a la planificación del desarrollo, incluyendo mediante sus propias propuestas y alternativas con respecto a los tipos de proyectos comúnmente promovidos por el Estado, las empresas y las instituciones financieras. Sin embargo, en el caso específico de Agua Zarca y otros proyectos donde se hayan dado violaciones similares de derechos humanos, se ha perdido una valiosa oportunidad para incorporar a todos los pueblos indígenas de la región en la planificación del desarrollo, y por lo tanto, deben considerarse otras alternativas que sean respetuosas con los derechos de los pueblos indígenas.

# VIII. Recomendaciones

### El proyecto Agua Zarca

67. **Teniendo en cuenta los actos de amenaza, hostigamiento y de violencia perpetrados durante años contra miembros de COPINH y de Río Blanco opuestos al proyecto Agua Zarca (párrs XX-XX), además de la imputación de por lo menos dos personas vinculadas con la empresa DESA por el asesinato de Berta Cáceres, y las violaciones relacionadas con la falta de consulta previa, se debe considerar seriamente revocar el contrato a favor de la empresa DESA, así como las licencias y otros permisos a favor del proyecto Agua Zarca.**

68. **Asimismo, se debe proceder a la desmilitarización de la región de Río Blanco y de la zona del proyecto mediante el retiro de las fuerzas militares, policiales y de seguridad privada empleadas por la empresa.**

### Las investigaciones sobre el caso de Berta Cáceres y otros actos de violencia

69. **Deben profundizarse las líneas de investigación del asesinato de Berta Cáceres respecto a la posible participación de personas adicionales, incluyendo empleados y agentes de la empresa y agentes estatales, policiales, militares y empleados de seguridad privada. Para generar mayor confianza, se recomienda que el Gobierno solicite y acepte la asistencia técnica de organismos internacionales, incluida la Oficina del Alto Comisionado para los Derechos Humanos recientemente instalada en el país, y de expertos independientes, tal como han solicitado sus familiares, miembros de organizaciones indígenas y de la sociedad civil.**

70. **Asimismo, deben investigarse los distintos actos de violencia, asesinatos y amenazas contra otros miembros de COPINH y Río Blanco desde el inicio del proyecto Agua Zarca. Por su parte, la empresa DESA y las instituciones financieras deben colaborar con estas investigaciones. Cualquier persona, sea vinculada con la empresa o agente estatal, que pudiera haber cometido crímenes o haber sido cómplice en estos actos de violencia debe ser sometida a la justicia.**

[8] A/HRC/24/41, párr. 50.

**Medidas de protección contra la violencia**

**71. Deben tomarse medidas para evitar la repetición de los actos de violencia que se han dado en Río Blanco y otras partes de Honduras, por lo que se deben ampliar, fortalecer y dotar con los recursos necesarios los mecanismos de protección de dirigentes y miembros de los pueblos indígenas, y sus familiares, dedicados a la defensa de los derechos de sus pueblos, mediante sistemas eficaces de alerta temprana, acción urgente y otras (Ver. Informe de país, párr. XX).**

**72. El Estado hondureño debe adoptar las medidas legislativas, administrativas u otras necesarias para brindar protección a los pueblos indígenas contra las violaciones de derechos humanos cometidas por empresas privadas, incluyendo sistemas eficaces de investigación y sanción penal. Esto incluye la adopción de medidas eficaces para regular y fiscalizar a los agentes de seguridad privada contratados por empresas privadas, y para sancionar las violaciones a los derechos humanos que cometan. En áreas donde existan conflictos sociales debidos a proyectos de inversión y de desarrollo de recursos naturales, se debe dar prioridad al diálogo pacífico y evitar la intervención policial y militar.**

**La planificación del desarrollo y los pueblos indígenas**

**73. Como recomienda el informe de país (párrs. XX-XX) y el presente informe (párrs. XX-XX), los pueblos indígenas deben participar en la planificación del desarrollo nacional y de la política energética, según los estándares internacionales relativos a sus derechos sobre sus tierras, culturas y recursos naturales, así como a la consulta y consentimiento y a la realización de estudios previos de impacto social, cultural y ambiental, entre otros. Los pueblos indígenas deben tener una verdadera capacidad de incidir en las decisiones sobre la aprobación y ejecución de medidas o actividades que afectan sus derechos e intereses.**

**74. Como parte del deber de los Estados de proteger los derechos humanos y de la debida diligencia que deben ejercer las empresas e inversionistas, se deben realizar estudios previos sobre la presencia de pueblos indígenas en o alrededor de sitios propuestos para proyectos, y sobre los derechos a tierras, recursos naturales y consulta previa que pudieran corresponder a los pueblos indígenas bajo estándares internacionales. Si se prevén impactos significativos sobre las tierras, recursos naturales, culturas, sitios sagrados y otros derechos sustantivos, no se debe proceder sin el consentimiento libre, previo e informado de los pueblos indígenas afectados. Antes de proceder con la firma de contratos o de solicitar permisos, las empresas deben asegurarse de que el Estado ha cumplido con los estándares internacionales referidos.**

**75. Las instituciones internacionales financieras, países donantes y el sector financiero y empresarial del país deben asegurarse de que en sus relaciones comerciales o de otro tipo con empresas que realicen proyectos de desarrollo o inversión en o alrededor de territorios indígenas, se garanticen los derechos de los pueblos indígenas y su participación y consulta, de conformidad con los estándares internacionales de derechos humanos. Se debe prestar especial atención a la presencia de pueblos indígenas, a los derechos que les pudieran corresponder bajo estándares internacionales, y a otros factores relevantes, como las dinámicas de poder local que pudieran afectar la forma en que se realiza un proyecto y la forma en que puede impactar los derechos humanos de los pueblos indígenas. Estos aspectos se deben tomar en cuenta en los proyectos de desarrollo u otras actividades o medidas, incluyendo aquellas que promueven energías renovables u otros beneficios para los pueblos indígenas. El presente informe examina la situación de los pueblos indígenas en Honduras y hace recomendaciones al respecto, con base en la información recibida**

por la Relatora Especial durante su visita al país del 2 al 10 de noviembre de 2015, e investigación independiente.

76. Asimismo, se recomienda que los órganos de Naciones Unidas en Honduras, incluida la Oficina en Honduras del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, en cooperación con el Gobierno y los pueblos indígenas, proporcionen asistencia técnica al Estado para poner en práctica las recomendaciones contenidas en el presente informe. Los órganos de Naciones Unidas también deben asegurar que la planificación e implementación de sus programas y actividades en Honduras sean consultadas con los pueblos indígenas cuando éstas puedan tener algún impacto sobre sus derechos e intereses.

United Nations A/HRC/33/42/Add.3

General Assembly

Distr.: General
9 August 2016

Original: English

**Human Rights Council**
**Thirty-third session**
Agenda item 3
**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland. The present report examines the situation on the basis of research and investigation carried out, including during a conference organized by the Sami Parliamentary Council in Bierke Hemavan, Sweden, from 25 to 27 August 2015. During her visit, the Special Rapporteur heard repeated and insistent concerns over the increase in natural resource investments in the Sápmi region and the States' balancing of interests in that context. The balance, which is rarely free of conflict, is a primary focus of the present report. The Special Rapporteur concludes that there are still challenges that the Governments must meet, in particular with respect to adequately defining and recognizing the Sami people's rights over their land and related resources, and that further efforts are needed to advance and strengthen Sami rights, particularly in the face of increased natural resource investments in the Sápmi region.

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# Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*

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* Circulated in the language of submission only.

# I. Introduction

1. In the present report, the Special Rapporteur examines the human rights situation of the Sami people in Norway, Sweden and Finland on the basis of information received during her visit to the Sapmi region, including during a conference organized by the Sami Parliamentary Council in Bjurkle Hemavan, Sweden, from 2[illegible] to 2[illegible] August 2015, and on the basis of independent research. The visit was carried out in follow-up to the 2010 visit of the previous Special Rapporteur, James Anaya.

2. During her visit, the Special Rapporteur travelled to Stockholm, where she met with government officials, and to Bjurkle Hemavan, where she met with the Swedish Minister for Culture and Democracy, government officials from Norway, Sweden and Finland and representatives of the three Sami Parliaments. In addition, the Special Rapporteur spoke with representatives of local Sami communities and Sami non-governmental organizations. The Special Rapporteur would like to thank the Governments of Norway, Sweden and Finland for their openness and willingness to hold constructive discussions on the situation of the Sami people. She would like to express her appreciation to the Sami Parliamentary Council for organizing the conference in Bjurkle Hemavan and is grateful to the Sami Parliaments and local Sami communities for the information that provided and for their hospitality. She is also grateful to the staff of the Office of the United Nations High Commissioner for Human Rights for their assistance in ensuring the success of the mission.

3. In the present report, the Special Rapporteur does not purport to address all or the issues related to the Sami people or even all of the issues covered by the former Special Rapporteur in his report on the situation of the Sami people in the Sapmi region of Norway, Sweden and Finland (A/HRC/18/35/Add.2). During her visit, the Special Rapporteur heard significant concerns about the increase in natural resource investments in the Sapmi region and the adverse impacts the investments may have on the rights of the Sami people and the States' balancing of interests in that regard. The balance, which is rarely free of conflict, is a primary focus of the present report, although other key developments and issues are also raised. Conscious of the need to find workable solutions, the Special Rapporteur focuses her report on reviewing the sectoral legislation regulating natural resource investments in Norway, Sweden and Finland, and offers recommendations for measures that should be taken to ensure that the three States are not out of step with contemporary human rights values.

# II. The Sami people

4. The Sami people traditionally inhabit a territory known as Sapmi, which traverses the northern parts of Norway, Sweden, Finland and the Russian Kola peninsula. Although the Sami are divided by the formal boundaries of the four States, they continue to exist as one people and are united by cultural and linguistic bonds and a common identity. Regrettably, the Special Rapporteur did not have an opportunity to meet with representatives of the Government of the Russian Federation and Russian Sami during her visit. The present report will focus on the situation of the Sami people in Norway, Sweden and Finland only.

5. The Sami people's culture and traditions have evolved over hundreds of years through a close connection to nature and land. Traditionally, the Sami have relied on hunting, fishing, gathering and trapping, with reindeer herding, in particular, of central importance. Some Sami communities, referred to as Sea Sami or Coastal Sami, settled in the coastal areas within what is today Norway. The State borders that now divide the Sami homeland were established over a 200-year period, roughly from the middle of the

seventeenth to the middle of the nineteenth centuries, cutting through linguistic and cultural communities and constraining reindeer-herding activities. Today, the Sami population is a numerical minority within those States and is estimated to be between 70,000 and 100,000, with about 40,000 to 60,000 in Norway, 15,000 to 20,000 in Sweden, 9,000 in Finland and about 2,000 in the Russian Federation.

## III. Natural resource investments on Sami lands

6. In recent years, high mineral and energy commodity prices have driven an increase in natural resource investments in the Nordic countries. While locally that has been welcomed as a source of employment and development opportunities, it has also sparked conflict, especially in areas where Sami communities find themselves competing for their land with other interests, including the construction of buildings and roads, mining, windmills, hydroelectric dams, overhead power lines, oil and gas installations, forestry projects and tourism activities.

7. During her visit, the Special Rapporteur observed that the natural resource extraction currently under way in the Sapmi region has created an unstable atmosphere of social conflict. That is acknowledged not only by the Sami communities that are affected, but also by public authorities and extractive companies themselves. The tension between the competing interests of the Sami people and business activities that are being pursued on their lands is likely to inform the dynamics of indigenous issues in the Nordic countries and should, as a matter of priority, be addressed by the Governments concerned.

8. As the former Special Rapporteur noted, and in keeping with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, the responsibility of the State to ensure the protection of the rights of indigenous people in the context of natural resource investments entails "ensuring a regulatory framework that recognizes indigenous peoples' rights over lands and natural resources". That means respect for those rights both in all relevant State administrative decision-making and provision for effective sanctions and remedies when those rights are infringed either by government or corporate entities. The regulatory framework "requires legislation or regulations that incorporate international standards of indigenous rights" and that make them operational through the various components of State administration that govern "land tenure, mining, oil, gas and other natural resource extraction or development" (see A/HRC/24/41, para. 44).

9. A point of contention in the Special Rapporteur's discussions with representatives of the Sami people and the Governments concerned has been the scope and content of the State duty to consult the Sami people and the need to obtain their consent for natural resource investment projects on their traditional territories. Through traditional use, the Sami people have established property rights to their lands and resources and to property in the form of rights to continue to pursue their traditional livelihoods. The States' obligation to respect property rights on the basis of customary land tenure is grounded both in multilateral human rights treaties that are binding upon the Governments concerned, including the International Covenant on Civil and Political Rights, and the International

Based on country of birth and nationality.

See Human Rights Committee, general comment No. 23 (1994), para. 7.

Convention on the Elimination of All Forms of Racial Discrimination,[7] and the United Nations Declaration on the Rights of Indigenous Peoples.[8]

10. States' expropriation of land traditionally used by the Sami people, be it for the purpose of natural resource extraction or other development projects, constitutes a limitation of their property rights. Relevant international standards, such as the the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), establish that the State has a duty not only to consult with the affected Sami community but to obtain its free, prior and informed consent. The duty to consult and the requirement for consent apply not only to measures that will affect an already recognized right or legal entitlement, but to any measures that may affect lands that are traditionally owned or possessed under customary tenure, whether officially titled or not, of the Sami people. Consultation and consent are not a single event, but should readily occur at all stages of a project, from exploration to production to project closure. In addition to consultation and consent, additional safeguards need to be in place in order to ensure that the rights of the Sami people are adequately protected in the face of natural resource investments. Such additional safeguards include prior impact assessments that focus adequate attention on the full range of rights that may be affected, mitigation measures to avoid or minimize the impact on those rights, fair and equitable benefit-sharing and compensation for impacts.

## IV. Cross-border Sami initiatives

### A. Nordic Sami convention

11. An important cross-border initiative of the Sami people has been the effort to develop a Nordic Sami convention in conjunction with the Governments of Norway, Sweden and Finland with the aim of safeguarding and developing the Sami people's languages, culture, livelihoods and way of life with the least possible interference from the imposition of borders by national authorities. In 2005, the expert group appointed to draft the convention unanimously agreed on a draft text, which was presented to the Sami parliaments and Nordic Governments the same year. The draft convention includes provisions relating to self-determination, non-discrimination, Sami governance, including the Sami parliaments and their relationship to the State, languages and culture, education, and rights to lands, water and livelihoods. The draft convention also contains several provisions related to its implementation, including the establishment of a complaints mechanism.

12. Following long and complicated negotiations between Governments and Sami Parliaments on the modalities for continued negotiations, an agreement on the setting for negotiations on the convention was reached in November 2010, and negotiations towards adoption of the convention began in 2011 with the aim of completion by March 2016.

13. A recurring subject of concern during the Special Rapporteur's visit was the delay from the Governments in finalizing the convention. While she appreciates that there are a number of difficult questions on which to reach agreement, she hopes that the States concerned will take advantage of the opportunity to put in place positive measures designed

[7] See Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997) on the rights of indigenous peoples, para. 5; CCPR/C/SWE/CO/6, para. 20; CCPR/C/FIN/CO/6, para. 16; and CCPR/C/SWE/CO/7, para. 39.

[8] See the United Nations Declaration on the Rights of Indigenous Peoples, arts. 25-32.

to promote respect for their obligations to indigenous people based on their human rights obligations, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

14. The United Nations Declaration on the Rights of Indigenous Peoples should constitute an important impetus and guide for the Nordic Sami convention. The Declaration represents a global consensus among States, including Norway, Sweden and Finland, and indigenous peoples worldwide. As a product of decades of deliberations by indigenous peoples and States Members of the United Nations, the Declaration builds on the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties to which all three States are parties.

15. The Special Rapporteur notes, in particular, the active role that all three Governments played in the negotiations on the Declaration and in ensuring its adoption by the General Assembly in 2007. In their endorsement of the outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, which was held in September 2014,[1] all three States also reaffirmed their support for the Declaration and committed to upholding its principles. The Special Rapporteur appreciates that all three Nordic Governments have devoted a high level of attention to advancing the rights of indigenous peoples in international human rights forums. While she does not wish to diminish the significance of such support, it is her view that all three Governments need to explore ways to ensure that there is policy coherence between the positions they take in international human rights forums and those they take at home. The Special Rapporteur sees that the standards of the final outcome should not be lower than those to which all three States have committed in endorsing the Declaration and the outcome document.

16. The Special Rapporteur regrets that the Russian Sami have not been included in the process of drafting the Nordic Sami convention, but remains hopeful that, as soon as it has entered into force, the Nordic countries will initiate discussions with the Russian Federation on how the provisions of the convention can also become a reality for the part of the Sami population that resides within the Russian Federation.

## B. Sámi Giellagáldu

17. The Sami languages are central to Sami identity and essential to their survival as a people. With the number of speakers of the Sami languages decreasing rapidly, all nine Sami languages are now considered threatened or extremely threatened by the United Nations Educational, Scientific and Cultural Organization. While the Special Rapporteur appreciates that the Governments concerned have adopted different affirmative measures to revitalize Sami languages, more needs to be done. In particular, the Sami people's own initiatives, such as the cross-border project Sámi Giellagáldu, should be supported and long-term funding strategies developed to ensure their sustainability.

[1] See General Assembly resolution 69/2.

# V. Country analysis

## A. Norway

### 1. General legal and policy framework

18. In addition to being the first country to ratify the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), Norway voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. Norway has incorporated the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination into its domestic law.[7] The obligation of Norway to secure the rights of the Sami people also arises under the International Convention on the Elimination of All Forms of Racial Discrimination. In addition, Norway has endorsed the Guiding Principles on Business and Human Rights and in November 2015, it adopted a national action plan to give practical effect to that endorsement,[8] although the plan appears to focus on Norwegian companies operating abroad rather than on business activities and their impact on human rights within Norway.

19. Following an amendment adopted in 1988, the Norwegian Constitution establishes an obligation on the authorities to protect the Sami, their culture and traditional livelihoods. The Sami Act of 1987 establishes the Sami Parliament, giving it the dual function of serving as an elected political body for the Sami and carrying out administrative duties in various areas affecting Sami people.

### 2. Self-determination

20. In 2005, the Sami Parliament and the Government entered into an agreement concerning consultation procedures in matters that might affect Sami interests directly,[9] agreeing that consultations should continue as long as the Sami Parliament and State authorities considered it possible to achieve agreement. While representatives of the Sami Parliament indicate that the agreement has strengthened cooperation, they also shared the concern that its implementation remains particularly challenging in relation to energy development projects and reindeer husbandry. In addition, representatives of the Sami Parliament expressed frustration that the consultation agreement does not cover financial initiatives or budgetary measures, and that a previous agreement between the Government and the Sami Parliament that procedures for financial instruments would be dealt with in a separate process has yet to materialize.

### 3. Rights to lands, water and natural resources

21. The Finnmark Act of 2005 provides a potential foundation for the protection of Sami land and resource rights in Finnmark County. Under the Act, ownership of land and resources in Finnmark was transferred from State to local ownership, and the Finnmark Estate was established as the new landowner. The Estate serves multiple functions, including as a resource management agency, caretaker of the interest of local inhabitants and commercial entity.

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[7] See the Human Rights Act (1999), sect. 2, and the Anti-Discrimination Act (2005), sect. 2.

[8] See www.regjeringen.no/en/aktuelt/business_hr/id2457726.

[9] See the procedures for consultations between State authorities and the Sami Parliament [Norway], signed 11 May 2005, sect. 2.

22. The Finnmark Act formally recognizes that Sami communities and individuals and others, through long use of land and water, have acquired rights to land and natural resources in Finnmark and sets in motion a process for identifying and recognizing existing rights of use and ownership.[7] The identification process is carried out by the Finnmark Commission, while the Land Tribunal for Finnmark has been established to settle any disputes arising after the Commission has concluded its investigations into specified areas. Notably, if no local ownership rights are found in specified areas, the Finnmark Estate remains the proprietor of those areas. As such, a common criticism of the current model has been that it does not afford the local people of Finnmark a real right to manage their resources on their traditional lands and territories.

23. In 2011, the former Special Rapporteur noted that the extent to which the Finnmark Act would genuinely advance Sami self-determination and resource rights would be determined by its implementation over time (see A/HRC/18/35/Add.2, para. 44). While the process for identifying rights in the entire County of Finnmark has yet to conclude, the Special Rapporteur notes that in the investigations concluded to date,[8] the Commission has almost exclusively found no grounds for recognizing Sami individual or collective ownership or usage rights beyond usage rights already granted to all inhabitants in Finnmark. Such conclusions seem to have been motivated by the State's active and extensive disposition of land and resources in the investigated fields which is seen to have precluded property or usage rights for the local population.

24. The Special Rapporteur is of the view that the State's earlier dispositions as the claimant of property rights in Finnmark cannot be considered to create law in order to support its continued ownership of land. The importance of that point can be further underscored by the fact that in many cases, the Sami communities' severed connection to their lands and resources is a result of earlier government policies and assimilation efforts towards the Sami. A starting point for any measures to identify and recognize indigenous peoples' land and resource rights should be their own customary use and tenure systems. That is also clear in the United Nations Declaration on the Rights of Indigenous Peoples, article 26 (3) of which indicates that States are obligated to provide legal recognition and protection to those lands, territories and resources that indigenous peoples have traditionally owned, occupied or otherwise used or acquired "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned". Likewise, article 8 (1) of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) provides that due regard must be paid to customs and customary law of the indigenous peoples concerned in applying national laws and regulations.

25. The dual role of the Finnmark Estate as both a resource management agency and commercial entity has also been cause for concern. According to information received, the Estate is currently processing applications for land encroachments in Finnmark County that may have long-standing adverse impacts on the possibilities of Sami communities to pursue their traditional livelihoods. In the Special Rapporteur's view, the ability of the Estate to handle the dual role will be essential for its legitimacy and for the Finnmark Act to genuinely advance Sami land and resource rights.

26. Another outstanding concern is the lack of specialized mechanisms in place to identify Sami land and resource rights outside Finnmark outside the ordinary court system, despite the previous Special Rapporteur's recommendation in 2011 that Norway finalize the process of clarifying and securing Sami land and resource rights both within and outside

[7] See the Finnmark Act, sect. 5.

[8] Findings of the Finnmark Commission in Stjernøya/Seiland (2012), Nesseby (2013), Sørøya (2013), the Varanger Peninsula East (2014) and Varanger Peninsula West (2015).

Finnmark County (see A/HRC/18/35/Add.2, para. 81). The Committee on the Elimination of Racial Discrimination has recommended that Norway follow up on the proposals of the Sami Rights Committee, including by establishing an appropriate mechanism and legal framework, and identify and recognize Sami land and resource rights outside Finnmark (see CERD/C/NOR/CO/21-22, para. 30 (b)).

27. The Special Rapporteur heard explanations from Sami representatives that resource areas, the diversity of nature, cultural monuments, the landscape and the fjords comprise an important part of the basis for their culture. The management of areas, nature and cultural heritage is therefore important to ensure the basis for preserving and developing Sami culture. It is important to find good solutions for the management of the use and conservation of natural resources that secure the reindeer husbandry, fresh and seawater fishing, small-scale farming, hunting and gathering that are important to Sami culture. The Special Rapporteur noted disagreement between State authorities and the Sami people on the current regulations on sea salmon fishing and spring duck hunting in the municipality of Guovdageaidnu/Kautokeino.

28. A major concern of Sami representatives relates to the Minerals Act[1] and its limited recognition of the rights of the Sami people. Despite objections from the Sami Parliament, the Minerals Act was adopted in 2009, and was the subject of an exchange of correspondence between the former Special Rapporteur and the Government of Norway. In 2015, the Committee on the Elimination of Racial Discrimination raised concerns over the Act's limited safeguards for the Sami people and recommended that it be revised (see CERD/C/NOR/CO/21-22, para. 30).

29. A central concern is that the Minerals Act differentiates between the Sami in Finnmark and those outside Finnmark, who have no specific rights or safeguards. The distinction is particularly problematic as there are currently no legal frameworks or specialized mechanisms in place to identify Sami land and resource rights outside Finnmark County, and it may in practice jeopardize future recognition of Sami claims to their traditional lands and resources. Another concern expressed to the Special Rapporteur relates to the absence of a requirement to consult and obtain consent for proposed measures. While the Act provides the Sami Parliament with an opportunity to comment on applications for licences in Finnmark and attributes some weight to Sami culture when assessing the applications,[2] the Special Rapporteur does not consider that international standards are met when consultation consists of a mere opportunity to comment on proposed measures that may have a significant impact on the Sami people and their rights. Another way in which the Minerals Act does not meet international standards is the lack of specific consultation or consent requirements with respect to the particular Sami communities that will be directly affected by the proposed measures.

30. While the Special Rapporteur notes that the procedures for consultations between the Norwegian and Sami Parliaments apply to the whole central government administration and are said to embrace mineral activities, there appears to be a lack of common understanding between the Government and the Sami Parliament about how the consultation agreement is to be complied with in practice. Sami representatives have suggested that the implementation of the procedures for consultation remains particularly challenging in relation to energy development projects and reindeer husbandry. That, together with a regulatory regime that does not adequately protect Sami interests and rights, makes it difficult to ensure predictability and to allow for coexistence between traditional and new industries. In the view of the Special Rapporteur, the criticism frequently directed

[1] Act of 19 June 2009 No. 101 relating to the acquisition and extraction of mineral resources.

[2] See the Minerals Act, sect. 17.

at the consultation procedures is a strong impetus for their evaluation, with the participation of the Sami Parliament, to ensure their effectiveness.

31. Attention has also been drawn to the absence of provisions for benefit-sharing with Sami communities when mines are located on traditional Sami lands, and to the absence of any frameworks for dispute resolution between mining companies and affected Sami communities. Sami representatives have also shared their concerns that applications for exploration and exploitation concessions are considered in a piecemeal fashion, with little consideration given to the interaction of the proposed measure with already existing projects and the accumulated impact that they have on the affected Sami communities.

32. In the light of the international human rights obligations and commitments that Norway has assumed with respect to the Sami people, including the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), the Minerals Act raises doubts about the State's ability to respect, protect and fulfil human rights in the context of extractive activities. It also raises doubts as to whether the State is setting out clearly the expectation that all business enterprises respect human rights throughout their operations. From a business perspective, a deficient regulatory framework also creates barriers for businesses to carry out their operations in a manner consistent with international expectations regarding the rights of indigenous peoples. As much has also been made clear by the Norwegian mineral industry which, in an open letter addressed to the Government in December 2014, requested that the Minerals Act be revised and clarified with respect to the Sami people and their rights.

### 4. Language and education

33. In Norway, the Sami people's right to preserve and develop their languages is recognized in the Constitution and in several laws, including the Sami Act of 1987. Following the visit of the previous Special Rapporteur, the Government adopted an Action Plan for Sami Languages, which has reportedly been a useful tool in the work to strengthen and develop the Sami languages. The Special Rapporteur was pleased to learn that, based on an initiative from the Sami Parliament, a committee to evaluate legislation, measures and arrangements for the Sami languages was appointed in 2014 to clarify current initiatives in place and how they can be adapted within the public sector to ensure functional and equal public services in Sami. She hopes that the committee's report, which is due to be issued in September 2016, will contain recommendations to address the concerns about the need for a more comprehensive language policy that covers society as a whole and for government departments to be better informed about Sami conditions and languages in order to be able to put in place such a comprehensive language policy.

34. With respect to culturally appropriate education, the Sami Parliament has raised concern over the limited oversight and quality of Sami educational programmes. County governors' offices are responsible for overseeing training programmes in Norway, and the Sami Parliament has not been invited to play a part in oversight or evaluations.

## B. Sweden

### 1. General legal and policy framework

35. In relation to its international human rights obligations to protect the rights of indigenous people, Sweden is party to the major United Nations human rights treaties. Sweden voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, but has not ratified the ILO Indigenous and Tribal Peoples Convention,

1989 (No. 169), despite recommendations from international human rights mechanisms to do so.[9] Sweden has endorsed the Guiding Principles on Business and Human Rights and adopted a national action plan for business and human rights in August 2015, similar to its Norwegian counterpart, primarily focused on human rights in Swedish business operations abroad. A central weakness of the national action plan is its lack of consideration of indigenous peoples, including the Sami.

36. Following a recent amendment, as of 1 January 2011, the Swedish Constitution recognizes the Sami as a people rather than a minority group in Sweden. The Sami Parliament Act established the Swedish Sami Parliament with the principal function of "monitoring issues concerning the Sami culture in Sweden".[10]

## 2. Self-determination

37. As noted by the former Special Rapporteur, there is an ongoing need to increase the Sami parliaments' autonomy and self-governance authority and to strengthen their ability to participate in and genuinely influence decision-making in matters that affect the Sami people (see A/HRC/18/35/Add.2, para. 37). Of particular concern is the structure of the Swedish Sami Parliament, which functions as both a State administrative agency and as a popularly elected body. Representatives of the Swedish Sami Parliament have expressed concern that its role as State administrative agency obliges it to implement policies and decisions made by the Swedish Parliament and government institutions, which are sometimes at odds with the policy preferences of the Sami people (see A/HRC/18/35/Add.2, para. 42). Concerns have also been raised about its limited decision-making power.

## 3. Rights to lands, water and natural resources

38. The Reindeer Herding Act recognizes the Sami people's right to use land and water traditionally used for themselves and their reindeer.[11] Reindeer herding rights in Sweden are exclusive to the Sami people and may only be exercised by those who are members of designated communities, known as *samebyar*, and who practise reindeer herding as their principal livelihood. Specific reindeer grazing areas have not yet been officially demarcated in Sweden. Importantly, in 2002 the Government appointed a Boundary Delimitation Commission to identify lands traditionally used by the Sami people. The Commission delivered its report in 2006.[12] Although the former Special Rapporteur recommended that Sweden increase its efforts to demarcate the traditional territory of the Sami people (see A/HRC/18/35/Add.2, para. 82), the Government has not yet done so. The limited protection for the Sami people of their right to their lands and resources and the lack of concrete action, including the adoption of specific legislation, is cause for concern and continues to be subject to criticism by the United Nations human rights treaty bodies.

39. Compounding the difficulty faced by the Sami in asserting their rights is the fact that the legal aid system in Sweden does not provide financial support for Sami people to that end, a concern also previously raised by United Nations human rights treaty bodies (see CCPR/C/SWE/CO/6, para. 21, and CERD/C/SWE/CO/18, para. 20) and the former Special Rapporteur (see A/HRC/18/35/Add.2, para. 53). In practice, the exclusion of Sami

[9] See CERD/C/SWE/CO/19-21, para. 19; E/C.12/SWE/CO/5, para. 15; A/HRC/29/13, paras. 145.2–145.4, 146.6 and 146.7; A/HRC/18/35/Add.2, para. 73; and CCPR/C/SWE/CO/7, para. 39.

[10] *Sameting slag (1992:1433)*, sect. 1.

[11] *Rennäringslagen (1971:437)*.

[12] Report of the Boundary Delimitation Committee (SOU 2006:14).

[13] See, for example, E/C.12/SWE/CO/5, para. 15; CERD/C/SWE/CO/19-21, para. 17; and CCPR/C/SWE/CO/7, para. 39.

communities from financial support under the Legal Aid Act[39] has significantly limited their ability to effectively assert their rights, including in the face of natural resource investments on their traditional territories and in disputes concerning reindeer grazing rights.

40. The main legislation governing mining activities in Sweden is the Minerals Act.[40] Unlike its Finnish and Norwegian counterparts, the Minerals Act does not include any explicit references to Sami rights. While Sami reindeer herding rights are formally protected, that is not explicitly mentioned in the Minerals Act, but rather in related legislation.

41. In addition to the Minerals Act, the Environmental Code[41] applies in matters concerning the granting of a concession, while a permit for exploitation is granted under both the Minerals Act and the Environmental Code. Exploration permits and exploitation concessions are granted by the Mining Inspectorate and may be appealed before the Government. While companies must submit an environmental impact assessment in order for an exploitation concession to be granted, that process merely seeks to establish the conditions for mining and does not preclude mining activities if negative impacts on Sami culture and livelihoods are found.

42. There are no requirements for social impact assessments under Swedish law. Assessments for permits and concessions are conducted on a case-by-case basis and applications for exploration and exploitation permits are not evaluated against already existing projects and the cumulative impact that they may have on the affected Sami communities. That is seen as particularly problematic as many Sami communities are struggling to adjust to multiple extractive and development projects on their traditional territories, a point that has been raised not only by affected Sami communities but also by companies pursuing projects on Sami lands.[42]

43. Following amendments in 2014, the Minerals Ordinance[43] specifies that for activities proposed in reindeer herding areas, the Sami Parliament has the right to be informed and to express an opinion on applications for exploitation permits. However, the Special Rapporteur was informed that those amendments have substantially increased the workload of the Sami Parliament, but that has not been coupled with the increase in budget needed to adequately accomplish the task. At the earliest stages of the permit process, the landowner and other interested parties, which have been specified to include reindeer herding communities only, also have a right to be informed about the workplan and to express their opinion or opposition to the plan. In the view of the Special Rapporteur, that provision cannot readily be seen as meeting the State's duty to consult and obtain the consent of affected Sami communities as its scope is limited to a right to state an opinion on a proposed plan of operations, and does not entail a right to withhold consent to the granting of the permit.

44. Areas deemed to be of national interest for reindeer herding are protected through the Environmental Code, and the Sami Parliament is the responsible agency for identifying such areas.[44] A central concern, however, is the fact that those areas may overlap with other national interests, designated by other State agencies, including energy production, nature

[39] *Rättshjälpslag (1996:1619)*.
[40] *Minerallagen (1991:45)*.
[41] *Miljöbalk (1998:808)*.
[42] See the decision of the Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises in Jijnevaerie Sami Village and Statkraft SCA Vind AB (SSVAB) (2016) 6.4, p. 9.
[43] *Mineralförordning (1992:285)*.
[44] See *Miljöbalk*, chap. 3, sect. 5.

conservation, but also mineral exploitation. In that regard, the Environmental Code regulates how conflicts between different classifications of national interest, for example reindeer husbandry and the prospects of economic gain from mineral extraction, should be resolved. According to the Environmental Code, when such interests collide, the State should give precedence to the interest that best promotes long-term sustainable use of land and water and take ecological, social, culture and economic factors into account.[24]

45. The Special Rapporteur heard significant concerns about the balancing of interests that is called for in the Environmental Code. In practice, the weighing of interest is rarely done and when it does happen, relevant State bodies appear to routinely assess reindeer herding exclusively from an economic perspective and balance it against the State's interest in job creation and State revenue from mining activities. Sami representatives shared their concerns about the sequencing of the process, as the weighing of interests takes place at a late stage of the permit process, when the relevant extractive companies' and local politicians' expectations about a new mine are already high.

46. The Special Rapporteur notes that under international standards and comparative legal practice, the State's expropriation of lands traditionally used by Sami communities, whether the lands have been officially titled or not, constitutes a limitation of their property rights and can be justified only if such a limitation is pursuant to a valid public purpose. Such a valid public purpose cannot be found in mere commercial interests or revenue-raising objectives (see A/HRC/24/41, para. 55). In the view of the Special Rapporteur, a balancing of interests as foreseen by the Environmental Code, where traditional Sami livelihoods are weighed against possible economic gain only, is not in line with the international human rights obligations and commitments that the State has assumed with respect to indigenous peoples.

47. In addition, the Special Rapporteur notes the lack in the legal framework regulating mineral extraction in Sweden of any specific requirements for fair and equitable benefit-sharing with Sami communities.

### 4. Rönnbäck mine

48. During her visit, the Special Rapporteur visited the site of the planned mining complex in Rönnbäck, located in the heartland of the Vapsten Sami village's traditional territory. The project has generated heated public debate nationally and gained attention internationally. Community members expressed concern to the Special Rapporteur that the proposed mining activities would destroy key areas within their traditional territory that are indispensable for the continued pursuit of their traditional livelihood. They said that their tolerance was fast reaching breaking point as they are already competing for their land with several other interests, including industrial logging, roughly 800 windmills and 2 mines. In addition, 80 applications for exploration concessions on their traditional territory are currently being considered. Despite appeals, the decision to grant the concession for the Rönnbäck mine was upheld by the Government in August 2013 and further sanctioned by a decision of the Supreme Administrative Court in October 2014. In its decision, the Government acknowledged that Sami reindeer husbandry rights were constitutionally protected, but that restrictions on those rights were nonetheless permitted in cases where it was in the public interest. In the Rönnbäck mine case, the State considered that the public interest had been met in the form of substantial economic gain.[25] In 2013, the Vapsten Sami village lodged a complaint with the Committee on the Elimination of Racial Discrimination, which in October 2013 requested Sweden to suspend all mining activities

[24] Ibid., sect. 10.

[25] See the decision of the Government (*Regeringsbeslut*) of 22 August 2013.

in Vapsten's traditional territory while the case was before the Committee. Faced with lost productivity due to the temporary shutdown, the company pulled out of the venture in 2015. While the Special Rapporteur does not wish to prejudice the outcome of the proceedings of the Committee, she is of the view that the case of Vapsten poignantly illustrates the need for a domestic regulatory framework that adequately recognizes and protects Sami rights in accordance with international human rights standards.

### 5. Language and education

49. Under the National Minorities and Minority Languages Act,[7] Sami languages spoken in Sweden are granted protections within certain designated administrative areas, including with respect to dealings with State agencies. Those legal guarantees, however, remain only partially implemented, often as a result of a lack of staff with Sami language skills.

50. In Sweden, education in the Sami language is mainly guaranteed in the Swedish Sami schools created in the 1990s. Currently, a Sami school pupil is required to enrol in 800 hours of Sami teaching. Over a period of six years of schooling, that amounts to fewer than four hours a week. Currently, there are only five Sami schools and their coverage does not extend to the entire Sami region.

51. Swedish municipalities may enter into agreement with any of the five Sami schools to pursue so-called integrated Sami teaching, meaning that they commit to provide Sami language teaching similar to that offered by the Sami schools, that is, 800 hours over six years. At present, only 9 of the 19 municipalities in the Sami administrative area provide integrated Sami teaching. In Sweden, Sami teaching is sporadic at best, with no schools providing regular Sami teaching beyond the elementary school levels.

52. The Swedish Educational Decree adopted in 2011[8] appears to further reduce the possibility for full Sami language immersion. Under the Decree, a student who is a member of a national minority, including the Sami people, has the right to mother-tongue teaching in his or her language. However, in primarily aiming to integrate national minorities, the Decree specifies that only half of the total amount of teaching can be in the mother tongue of the student and it is planned so as to ensure that teaching progressively increases in Swedish. Together, those requirements form an obstacle to effective Sami language teaching and prevent more Sami children from learning Sami languages.

## C. Finland

### 1. General legal and policy framework

53. Finland is party to all the major United Nations human rights instruments and voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. Finland has not ratified the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), although a proposal for ratification is currently under consideration. Similar to Norway and Sweden, in October 2014 Finland endorsed the Guiding Principles on Business and Human Rights and developed a national action plan for their implementation. While the action plan stipulates that Finland is committed to continuing a dialogue relating to the human rights impacts of business activities with United Nations bodies for indigenous peoples, there is no specific consideration of the impact of business operations in Finland and their potential impacts on the Sami people.

[7] *Lag (2009:724) om nationella minoriteter och minoritetsspråk.*

[8] *Skollagsförordningen (2011:185).*

54. The status of the Sami as an indigenous people is recognized in the 1999 Constitution,[28] which indicates that the Sami have a right to cultural autonomy and linguistic and cultural self-governance within their native region,[29] covering the municipalities of Enontekiö, Inari and Utsjoki, as well as the area of the reindeer owners' association of Lapland in Sodankylä. The Sami Parliament Act establishes the Finnish Sami Parliament with the mandate to protect the Sami language and culture and matters relating to their status as an indigenous people. The Act also affirms that State authorities should negotiate with the Sami Parliament "all far-reaching and important measures that may directly or indirectly affect the Sami's status as an indigenous people", including matters relating to the management, use, leasing and assignment of State lands, conservation areas and wilderness areas.[30]

55. Finland is also home to a distinct Sami group, the Skolt Sami. A separate law, the Skolt Act,[31] includes provisions on their rights in the Skolt native area, a part of the Sami native area in the municipality of Inari. The Act recognizes the Skolt Sami Village Council as the representative body of the Skolt Sami and requires that it be consulted in matters that could affect the rights of the Skolt Sami.

### 2. Self-determination

56. Despite the strong statutory affirmations of the Sami Parliament Act and the Skolt Act, the Finnish Sami Parliament and the Skolt Sami Village Council have limited decision-making power, in particular with respect to land and resource rights. Representatives of the Finnish Sami Parliament reiterated the concern they had shared with the previous Special Rapporteur that most of their proposals and comments to the State went unanswered by the Government.

57. A highly vexed question is that of the electoral register of the Sami Parliament in Finland. The Sami Parliament Act establishes several criteria that a person has to meet to qualify as Sami for the purpose of voting.[32] According to reports received, the criteria were decided on without the consent of the Sami Parliament and they have recently become the subject of contentious interpretations by the Supreme Administrative Court. In the course of the two recent elections, the Sami Parliament rejected a group of applicants to the electoral register on the basis that they did not meet the objective criteria established by the Sami Parliament Act. The applications were reportedly part of one of many campaigns organized by non-Sami inhabitants of the northern parts of Finland who attempted to register as Sami voters in order to influence the composition of the Sami Parliament. While the Special Rapporteur is not in a position to judge the accuracy of such allegations, her attention has been drawn to the fact that several of those seeking to enrol on the electoral register are known to be outspokenly critical of the Sami and their rights as an indigenous people. She also notes that, unlike in Norway and Sweden, the Finnish Sami Parliament Act provides for a right of appeal to an external judicial institution, the Supreme Administrative Court,[33] which has no Sami representation, and there are no requirements for the Court to have specific knowledge of Sami culture.

58. The Special Rapporteur notes that in 2013, the previous Government presented a legislative proposal to amend the Sami Parliament Act that entailed extending the obligation for State authorities to cooperate in negotiations with the Sami Parliament on

[28] See the Constitution of Finland, sect. 17.
[29] Ibid., sect. 121, para. 4.
[30] Sami Parliament Act (No. 974/1995).
[31] Skolt Act (No. 253/1995).
[32] See the Sami Parliament Act, chap. 1, sect. 3.
[33] Decision of the Supreme Administrative Court 2015/148.

projects involving the Sami people with the objective of ensuring their agreement to proposed measures. In addition, the proposal sought to revise the criteria for approval for inclusion on the electoral roll of the Sami Parliament so as to better correspond to the Sami people's own criteria for group membership.[54]

59. That proposal could have had the potential to address the recommendation the former Special Rapporteur made in 2011 to continue and enhance efforts to implement the right of the Sami people to self-determination and to more genuinely influence decision-making in areas of concern to them (see A/HRC/18/35/Add.2, para. 76). The proposal established a duty for State agencies to cooperate with the Sami Parliament and consult it with the objective of obtaining its consent in matters that would have an impact on the Sami homeland region, and in matters that would affect Sami languages and culture or the position or rights of the Sami as an indigenous people. However, after provoking a highly politicized debate, the proposal was removed from Parliament without a vote during the last week of the session in March 2015.

60. Unlike in Norway and Sweden, reindeer husbandry is not a right reserved for the Sami people but is open to any citizen of the European Union. Reindeer herding is regulated through the Reindeer Husbandry Act,[55] and does not distinguish between Finnish reindeer herding practices and traditional Sami reindeer husbandry, which is a cause for ongoing concern for Sami reindeer herders who perceive the Act as eroding their opportunities to pursue reindeer husbandry in a manner that is culturally appropriate for the Sami. The Sami have been requesting the revision of the Act for many years.

### 3. Rights to lands, water and natural resources

61. In Finland, 90 per cent of the land within the area that is designated as Sami homeland is legally State land and is administered by the Finnish Forest and Park Enterprise. While there have been negotiations between the Government and the Sami Parliament to find common ground on the land rights issue, the legal status of the lands that the Sami people have traditionally used and occupied in Finland remains unresolved. The possibility for some outstanding land issues to be addressed during the recent reform of the Enterprise ended with the removal of the Sami rights from the proposed amendments to the Act regulating the Enterprise, as discussed below.

62. The adoption of a new Mining Act[56] in 2011 saw the introduction of a commitment to ensuring the rights of the Sami as an indigenous people in the context of extractive activities, and the inclusion of several provisions to that end. Importantly, the Mining Act establishes that in the Sami homeland region, all activities under the Act are to be adapted "so as to secure the rights of the Sami as an indigenous people".[57]

63. More specifically, the Mining Act provides that in the case of exploration, gold panning or mining permit applications in the Sami homeland, the Skolt area and in designated reindeer herding areas, the permitting authority is obliged to assess the potential impacts of those activities on the Sami people's rights to maintain and develop their own language and culture prior to approving any permits.[58] The requirement to assess impacts may also be relevant to applications for permits in areas outside the Sami homeland region if the proposed activities may be of significance to the rights of the Sami people. A permit will not be granted if it is deemed to undermine conditions for Sami or Skolt livelihoods

[54] Government bill No. 167/2014.
[55] Reindeer Husbandry Act (No. 848/1990).
[56] Mining Act (No. 621/2011).
[57] Ibid., part I, chap. 1, sect. 1.
[58] Ibid., part II, chap. 5, sect. 38.

and culture, or if it will cause considerable harm to reindeer herding.[9] In assessing the impacts, the permit authority is required to take into consideration not just the potential effect of the permit applied for, but also that of any other corresponding permits or other activities, such as forestry, in the area.

64. Under the Mining Act, the Sami Parliament and the Skolt Sami Village Council have an independent right of appeal concerning permits granted on the grounds that the proposed activities undermine the rights of the Sami as an indigenous people or, in the case of the Skolt area, if the activities may essentially weaken the living conditions of the Skolt Sami and their livelihoods.[10] If relevant, the Sami Parliament, the Skolt Sami Village Council or local reindeer owners' association are also expected to participate in the final inspections following the closures of mines.[11] The Mining Act does not contain any provisions on benefit-sharing with the Sami people.

65. Currently, there are no active mines in the Sami homeland region, but there is gold panning. While the Sami Parliament does not oppose traditional gold panning, it has expressed opposition to mechanized gold-panning projects, which are increasingly destroying Sami areas and threatening traditional Sami livelihoods.

66. The Mining Act is ambitious and shows that the Government is responding to concerns raised by the Sami people. However, concern has been shared with the Special Rapporteur about the unsatisfactory implementation of the Act. One of the more specific concerns is that the impact assessments that are required under the Act have not sufficiently addressed adverse impacts on the affected Sami communities, which has obliged the Sami Parliament to appeal all permits granted in the Sami homeland region. In the view of the Special Rapporteur, that implementation gap can to a large degree be attributed to the fact that the Mining Act does not clearly define conditions that undermine Sami or Skolt livelihoods and culture or cause considerable harm to reindeer herding, leaving too much room for interpretation. The problem has been further compounded by a limited understanding of Sami culture and livelihoods on the part of the State agency in charge of granting permits, and the fact that the evaluation of impact assessments has tended to rely disproportionately on information provided by the applicants. Permits appear to have been granted on the assumption that the applicants' activities will not have an adverse impact on Sami or Skolt livelihoods and culture or cause considerable harm to reindeer herding, whereas in practice, in many cases, the activities for which permits have been granted have entailed land encroachments that are detrimental to Sami cultural livelihoods.

67. While the Special Rapporteur is encouraged by the new Mining Act and its provisions to accommodate Sami rights, the concerns communicated to her make her question whether it has brought about concrete changes on the ground. She reminds the Government that the Guiding Principles on Business and Human Rights clearly establish that, in meeting their duty to protect, States should not only enforce laws that aim at, or have the effect of, requiring business enterprises to respect human rights, but should also periodically assess the adequacy of such laws and address any gaps.[12] She encourages the Government, in consultation with the Sami Parliament, to assess why the Act is not being enforced effectively and what measures could reasonably correct the situation. In that connection, one proposal that surfaced in her discussions with Sami representatives was to establish an independent oversight mechanism with expertise on Sami issues under the auspices of the permit authority in order to ensure that the quality impact assessments

[9] Ibid., part II, chap. 5, sect. 50.
[10] Ibid., part VI, chap. 17, sect. 165 (5).
[11] Ibid., part V, chap. 15, sect. 146.
[12] Guiding Principle 3.

sufficiently take into account impacts on the Sami community. Such a mechanism could serve to ensure more effective implementation of the Sami safeguards in the Mining Act, and would also reduce costs, not only for affected communities that are forced to appeal permits that are granted, but also for the companies involved, which would avoid temporary shutdowns and delays.

68. A recent development that also relates to natural resource investments in the Sami homeland area is the new legislation on the Finnish Forest and Park Enterprise[43] to regulate the management of land and water areas that the State claims as its own. With the reform of the Finnish Forest and Park Enterprise Act, passed in March 2016, part of the Sami people's traditional territory will be transferred to a State-run enterprise which, among other things, has the responsibility for industrial-scale logging carried out in the Sami homeland. That issue was subject to a communication between special procedure mandate holders and the Government of Finland (see A/HRC/32/53, p. 29).

69. The Special Rapporteur takes note of the Government's position that the Act establishes municipal advisory boards in the Sami homeland region with a mandate to reconcile different views on the use and management of State-owned lands,[44] and that the boards may, to some extent, strengthen the rights of the Sami people. However, in her view the Act does not make sufficiently clear whether the Sami people will have any genuine possibilities to influence decisions that may have an impact on their rights, nor does the Act provide any information on the tasks, membership, term of office and appointment of the boards.

70. From the perspective of the Guiding Principles on Business and Human Rights, the Act also appears problematic. The Special Rapporteur reminds the Government that its commitment to the Guiding Principles entails taking additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State.[45] For the issue at hand, such additional steps should, at a minimum, entail recognizing Sami rights over their lands, resources and traditional livelihoods and legal provisions to that effect. While the recognition in the Act that efforts will be coordinated in a manner that ensures that the Sami people are able to enjoy their culture is important, its implications are not fully spelled out in the operative sections of the Act, leaving the rights of the Sami people vulnerable to political discretion. In order to ensure that the human rights of the Sami people are not eroded by the implementation of the Finnish Forest and Park Enterprise Act, the Sami Parliament and the Skolt Sami Village Council, as well as affected Sami communities, need to have a stronger voice in the relevant processes. At a minimum, the membership of the municipal boards provided for in the Act should have equal representation of the Sami people and the boards should have a clearly defined mandate to assess any potential impacts of activities on the Sami people's rights to maintain and develop their own language and culture prior to approving any permits.

### 4. Language and education

71. Education in the Sami languages is guaranteed by law within the Sami homeland, where municipalities are entitled to receive increased subsidies for teaching in the Sami language.[46] There is still no legislation or policy that guarantees education in the Sami language outside the core Sami area, where the majority of Sami students live, a concern that was raised by the Committee on the Elimination of Racial Discrimination (see

[43] Finnish Forest and Park Enterprise Act (No. 234/2016) (*Laki Metsähallituksesta*).
[44] Finnish Forest and Park Enterprise Act, chap. 10, sect. 39.
[45] Guiding Principle 4.
[46] Financing of Education and Culture Act (No. 1705/2009).

CERD/C/FIN/CO/20-22, para. 14). A shortage of Sami teachers and education material, especially in the numerically smaller Skolt and Anar Sami languages, presents a further problem for education in the Sami languages and culture. Some measures have been taken to facilitate distance learning, but problems have arisen, primarily due to a lack of funding. Importantly, government funds to the Sami Parliament for preparing learning materials in the Sami languages have increased since the visit of the previous Special Rapporteur. In addition, in March 2012, a Government-appointed working group submitted its proposal for a programme to revitalize the three Sami languages spoken in Finland. A decision-in-principle on the revival programme for the Sami languages that was approved by the Government in July 2014 set the aim of working towards clear changes in the well-being of the Sami languages by 2025, and increasing the number of Sami speakers throughout the country.

72. While the Sami Parliament is consulted with regard to the national core curriculum, there is currently no specific Sami teaching curriculum for education in the Sami homeland. That has prompted an untenable situation where municipally approved Sami curricula are merely translated versions of the Finnish school curriculum, in which Sami culture and history is given only minimal and general coverage.

## VI. Conclusions and recommendations

**73. For the Sami people, rights over their lands and resources are the sine qua non conditions for their long-term well-being and a prerequisite for them to be able to continue to exist as a distinct people. Those rights do not appear to be sufficiently established, implemented or judicially protected in Norway, Sweden or Finland, resulting in their perpetual insecurity and instability. While the Special Rapporteur appreciates that natural resource investments are of key importance for the domestic economies of the three countries, it is her view that their ambition to promote mining in a socially and ecologically sustainable manner cannot be achieved as long as Sami rights are not adequately reflected and safeguarded in the legislation that regulates natural resource extraction.**

**74. In the light of the countries' international human rights obligations and the commitments they have assumed with respect to the Sami people, the Mining Act in Norway and the Minerals Act in Sweden raise serious doubts about the States' ability to respect, protect and fulfil human rights in the context of extractive activities. They also raise doubts as to whether the States are clearly setting out the expectation that all business enterprises respect human rights throughout their operations. From a business perspective, the deficient regulatory frameworks have also created barriers for companies to carry out their operations in a manner consistent with international expectations regarding the rights of indigenous peoples.**

**75. In Finland, the Mining Act shows that the Government is responding to concerns raised by the Sami people. However, in practice the Act appears to have fallen short of its stated objective to ensure that mining activities and gold panning are adapted "so as to secure the rights of the Sami as an indigenous people". The Special Rapporteur also notes that the 2016 Finnish Forest and Park Enterprise Act will have a significant impact on the Sami people, and that removing safeguards for the Sami people is not in line with international human rights obligations with respect to the Sami people.**

## A. Norway

76. The Special Rapporteur recommends that Norway enhance efforts to implement the right of the Sami people to self-determination and to more genuinely influence decision-making in areas of concern to them. That may to some extent be achieved through a more effective consultation arrangement, which should be extended to clearly cover budgetary decisions.

77. The Special Rapporteur recommends that Norway, together with the Sami Parliament and Sami communities, assess the adequacy of the Finnmark Act in advancing the Sami people's self-determination and land and resource rights. She calls on Norway to finalize the process of clarifying and securing Sami land and resource rights outside Finnmark County, and to ensure that due respect is paid to the customs, traditions and land tenure systems of the Sami people in implementing the Finnmark Act and in designing and implementing measures for recognition of land and resources outside Finnmark County.

78. Noting that sea salmon fishing and spring duck hunting in the municipality of Guovdageaidnu/Kautokeino form an important part of Sami cultural heritage and should be protected by special measures to ensure they can be pursued and maintained according to Sami tradition in a culturally and ecologically sustainable way, the Special Rapporteur urges the Government of Norway and the Sami Parliament to find solutions on regulations related to sea salmon fishing and spring duck hunting.

79. The Special Rapporteur calls on Norway to revise the Minerals Act to ensure that it conforms to relevant international standards, including those requiring adequate consultations with the affected indigenous communities and their free, prior and informed consent, mitigation measures, compensation and fair and equitable benefit-sharing. In addition, applications for exploration and exploitation permits should be evaluated against already existing projects and the cumulative impact that they have on the affected Sami communities.

80. The Special Rapporteur commends Norway for the adoption of the Action Plan for Sami Languages, which contains a number of good initiatives. In order to ensure that the plan is effective, relevant ministries should follow up and assess whether and to what extent all the measures have been completed and publicize the information in a final report that includes a follow-up plan for measures yet to be completed. In addition, the Government should enter into dialogue with the Sami Parliament on measures needed to ensure that government departments are better informed about Sami conditions and Sami languages and the development of a more comprehensive language policy. With respect to education, the Sami Parliament should be ensured a role in the oversight and evaluation of Sami educational programmes and their quality.

## B. Sweden

81. The Special Rapporteur encourages Sweden to introduce reforms to ensure that the Sami Parliament has greater independence from State institutions and authorities. To that end, she urges Sweden to review the Sami Parliament's statutory status and functions in relation to government authority structures to ensure its independent decision-making powers and to ensure that adequate funding is allocated for the Sami Parliament to carry out its work as a popularly elected body.

82. The Special Rapporteur recommends the expeditious resolution of Sami land and resource rights issues by introducing appropriate legislation. She also reiterates the recommendation of the previous Special Rapporteur that Sweden adopt legislation to revise the high burden of proof required to establish traditional Sami rights to land in court proceedings and to provide Sami parties with legal aid in such proceedings.

83. As a matter of priority, Sweden should revise its Minerals Act to ensure that it is in compliance with international human rights standards, including adequate consultations with affected indigenous communities and their free, prior and informed consent at all stages of the permit process, mitigation measures, compensation and fair and equitable benefit-sharing.

84. Sweden should redouble its efforts to revitalize Sami languages and strengthen programmes for education in Sami languages, including by providing adequate funding to the Sami Parliament to assist in the implementation of concerted efforts to those ends, and by revising the Swedish Educational Decree to ensure that it does not hamper full Sami language immersion. In addition and at a minimum, all municipalities in the Sami administrative area should provide integrated Sami teaching.

## C. Finland

85. The Special Rapporteur encourages the Government to reopen negotiations with the Sami Parliament on amendments to the Sami Parliament Act and to jointly develop a final and mutually acceptable proposal that addresses the full range of issues, including those relating to identification of a person as Sami for the purpose of registering on the electoral register.

86. Finland should, as a matter of priority, revise the Reindeer Husbandry Act and introduce special protection for Sami reindeer husbandry given the centrality of that means of livelihood to the culture of the Sami people.

87. In consultation with the Sami Parliament, Finland should continue to assess why the Mining Act is not being enforced effectively and what additional measures may be taken to reasonably correct that situation.

88. In order to ensure that the human rights of the Sami people are not eroded by the implementation of the Finnish Forest and Park Enterprise Act, the Sami Parliament and the Skolt Sami Village Council, as well as affected Sami communities, should be ensured a strengthened voice in related processes. At a minimum, the membership of the municipal boards provided for in the Act should have full and effective representation of the Sami people and a clearly defined mandate to assess any potential impacts of activities on the Sami people's rights to maintain and develop their own language and culture prior to approving any permits, to refrain from granting such permits if the activities risk undermining conditions for Sami or Skolt livelihoods and culture, or if they will cause considerable harm to reindeer herding.

89. As a matter of priority, Finland should ensure that the revival programme for the Sami languages receives adequate and long-term funding and that its implementation is evaluated annually, and is reported on to United Nations human rights mechanisms in the context of treaty body reviews. Finland should address the shortage of Sami teachers and education material, especially in the numerically smaller Skolt and Ánar Sami languages, and ensure that distance learning receives additional funding. In close consultation with the Sami Parliament, Finland should develop a Sami teaching curriculum for education in the Sami homeland and work with the Sami Parliament in preparing and approving the national school curriculum to ensure that it includes sufficient and accurate guidance on Sami history and culture.